DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-1227
Title: Carol Anne Bond, Petitioner
v.
United States
Docketed: April 13, 2010
Linked with 09A825
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (08-2677)
Decision Date: September 17, 2009
Rehearing Denied: December 10, 2009
Questions Presented

---Date---	--------Proceedings and Orders----------
Mar 9 2010	Application (09A825) to extend the time to file a petition for a writ of certiorari from March 10, 2010 to April 9, 2010, submitted to Justice Alito.
Mar 9 2010	Application (09A825) granted by Justice Alito extending the time to file until April 9, 2010.
Apr 9 2010	Petition for a writ of certiorari filed. (Response due May 13, 2010)
May 4 2010	Order extending time to file response to petition to and including June 14, 2010.
Jun 11 2010	Order further extending time to file response to petition to and including July 9, 2010.
Jul 9 2010	Brief of respondent United States filed.
Jul 20 2010	Reply of petitioner Carol Anne Bond filed. (Distributed)
Jul 21 2010	DISTRIBUTED for Conference of September 27, 2010.
Oct 4 2010	DISTRIBUTED for Conference of October 8, 2010.
Oct 12 2010	Petition GRANTED.
Nov 10 2010	Stephen R. McAllister, Esquire, of Lawrence, Kansas, is invited to brief and argue this case, as amicus curiae, in support of the judgment below.
Nov 17 2010	The time to file the joint appendix and petitioner's brief on the merits is extended to and including December 3, 2010.
Nov 17 2010	The time to file the brief of Court appointed amicus curiae, in support of the judgment below, is extended to and including January 10, 2011.
Nov 23 2010	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Dec 3 2010	Brief of respondent United States in support of petitioner filed.
Dec 3 2010	Joint appendix filed. Statement of costs filed.
Dec 3 2010	Brief of petitioner Carol Anne Bond filed.
Dec 10 2010	Brief amici curiae of Center for Constitutional Jurisprudence, and the Cato Institute filed.
Dec 10 2010	Brief amici curiae of Gun Owners of America, Inc., et al. filed.
Dec 10 2010	Brief amici curiae of Alabama, et al. filed.
Dec 10 2010	Brief amicus curiae of Eagle Forum Education & Legal Defense filed.
Dec 23 2010	SET FOR ARGUMENT On Tuesday, February 22, 2011.
Jan 3 2011	CIRCULATED.
Jan 10 2011	Brief amicus curiae of Court appointed amicus curiae in support of the judgment below filed. (Distributed)
Jan 14 2011	Motion of the United States in support of petitioner for divided argument filed.
Jan 19 2011	Record for U.S.C.A. for Third Circuit is electronic. There are sealed documents in this record.
Jan 24 2011	Motion for divided argument filed by the Acting Solicitor General GRANTED.

Jan 25 2011	Record received from U S D C for Eastern District of Pennsylvania (Philadelphia) (1 box)
Feb 9 2011	Reply of respondent United States in support of petitioner filed. (Distributed)
Feb 9 2011	Reply of petitioner Carol Anne Bond filed. (Distributed)
Feb 22 2011	Argued. For petitioner: Paul D. Clement, Washington, D. C. For respondent in support of petitioner: Michael R. Dreeben, Deputy Solicitor general, Department of Justice, Washington, D. C. For amicus curiae in support of the judgment below: Stephen R. McAllister, Lawrence, Kan. (Appointed by this Court.)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

(1)

No. _____

In the
Supreme Court of the United States

CAROL ANNE BOND,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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April 9, 2010

QUESTION PRESENTED

Petitioner admitted that she tried to injure her husband's paramour by spreading toxic chemicals on the woman's car and mailbox. Instead of allowing local officials to handle this domestic dispute, the federal prosecutor indicted petitioner under a federal law, 18 U.S.C. § 229(a), enacted by Congress to implement the United States' obligations under a 1993 treaty addressing the proliferation of chemical and biological weapons. Facing a sentence of six years in prison, petitioner challenged the statute and her resulting conviction as exceeding the federal government's enumerated powers and impermissible under the Tenth Amendment. Declining to reach petitioner's constitutional arguments, and in acknowledged conflict with decisions from other courts of appeals, the Third Circuit held that, when the state and its officers are not party to the proceedings, a private party has no standing to challenge the federal statute under which she is convicted as in excess of Congress's enumerated powers and in violation of the Tenth Amendment.

The question presented is:

Whether a criminal defendant convicted under a federal statute has standing to challenge her conviction on grounds that, as applied to her, the statute is beyond the federal government's enumerated powers and inconsistent with the Tenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 581 F.3d 128, and reproduced in the appendix at App. 1. The unpublished order of the court of appeals denying rehearing and rehearing en banc is reproduced at App. 25.

The district court's unpublished bench ruling, denying petitioner's motions to suppress and dismiss, is reproduced at App. 26–35.

JURISDICTION

The court of appeals rendered its decision on September 17, 2009, and denied a timely petition for rehearing and rehearing en banc on December 10, 2009. App. 25. On March 9, 2010, Justice Alito extended the time for filing a petition for certiorari to and including April 9, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend X.

The legislative powers of Congress are enumerated in Article I, section 8 of the United States Constitution, but do not include any general police power. *See* U.S. Const. art. I, § 8.

The relevant portions of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (commonly referred to as the "Chemical Weapons Convention") are reproduced at App. 37–42.

To fulfill its obligations under the Chemical Weapons Convention, Congress enacted penal legislation codified at Title 18, section 229 of the United States Code.

Title 18, section 229(a) of the United States Code, provides in pertinent part:

> (a) Unlawful conduct. — Except as provided in subsection (b), it shall be unlawful for any person knowingly —
>
> > (1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; * * * *

Title 18, section 229F(1)(A) of the United States Code, in pertinent part, defines a "chemical weapon" as a "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose."

Title 18, section 229F(8)(A) of the United States Code, in pertinent part, defines "toxic chemical" as

"any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals."

STATEMENT OF THE CASE

This case arises out of a domestic dispute that arose from a married woman's discovery that her closest friend was pregnant with her husband's child. In the wake of that traumatic discovery, the wife tried to injure, but not kill, the former friend by spreading toxic chemicals on her car door handles, front doorknob, and mailbox. Instead of referring this domestic dispute to local law enforcement authorities, the United States Attorney decided that a federal prosecution was in order and indicted petitioner on the novel theory that, because the assault involved chemicals, petitioner had violated a federal statute implementing the United States' treaty obligations under an international arms-control agreement that prohibits nation states from producing, stockpiling, or using chemical weapons.

A. The Underlying Domestic Dispute

Petitioner Carol Anne Bond is a 40-year-old woman who, until she was incarcerated, lived with her husband, Clifford Bond, and their adopted child, in the small borough of Lansdale, Pennsylvania. App. 67. Lansdale is located about 28 miles northwest of Philadelphia and has a population of approximately 17,000. Within the community, Ms. Bond is known by her nickname "Betty." She has a masters degree in business administration and a masters degree of science in microbiology. App. 74–75.

Ms. Bond lived in Lansdale since 2001 and has been married to her husband for more than 14 years. App. 67. Before marrying, Ms. Bond lived most of her life in Barbados, where she was raised by her mother. App. 66. As a young child, Ms. Bond's father had multiple affairs and fathered other children outside of marriage. *Id.* When she was eleven, Ms. Bond's parents divorced, and Ms. Bond has not seen her father for more than 17 years. *Id.*

In 1995, Ms. Bond moved with her mother and sister to the United States, where she became close friends with Myrlinda Haynes, a woman who had also immigrated from Barbados. App. 66. Ms. Bond, as well as her mother and sister, came to consider and treat Ms. Haynes as virtually a member of the family. Ms. Haynes owned a home in the nearby municipality of Norristown. App. 56, 69.

In 2006, Ms. Haynes announced that she was pregnant. Unable to bear a child of her own, Ms. Bond was happy and excited for her closest friend. App. 2. But this initial excitement did not last. Ms. Bond later learned that the child's father was her own husband. *Id.* The news of this double betrayal, which brought back painful memories of her father's infidelities, caused Ms. Bond to fall apart. She started losing her hair and suffered intense periods of depression, anxiety, and occasional panic. App. 72–73.

In the midst of her emotional breakdown, Ms. Bond became fixated on punishing Ms. Haynes and making her "life a living hell." App. 48. Ms. Bond stole a bottle of 10-chloro-10-H phenoxarsine (an arsenic-based chemical) from her employer, the chemical manufacturer Rohm & Haas, and she

purchased a vial of potassium dichromate through Amazon.com from a photography equipment supplier. App. 2. Both chemicals are toxic and, if ingested or exposed to the skin at sufficiently high doses, can be lethal. App. 2 n.1. Ms. Bond knew that the chemicals were irritants and believed that, if Ms. Haynes touched the chemicals, she would develop an uncomfortable rash. App. 58.

According to the government, between November 2006 and June 2007, Ms. Bond went to Ms. Haynes's home on several occasions and spread chemicals on Ms. Haynes's car door handle and mailbox, and on the doorknob of her apartment's front door. App. 2. None of these attempted assaults were successful or particularly sophisticated. *Id.* In fact, Ms. Haynes avoided harm because she always noticed the easy-to-spot chemicals, except once when she sustained a small chemical burn to her thumb that "required repeated rinsing with water." App. 54. This is the only physical injury that Ms. Haynes suffered. *Id.* Although it is possible that the chemicals could cause death at sufficiently high doses, the undisputed evidence shows that Ms. Bond had no intent to kill Ms. Haynes. App. 57–58, 60–61.

When Ms. Haynes became aware that someone was spreading chemicals on her car door handle and in her mailbox, she complained to the local police and to the postal inspection service. In response, postal inspectors installed surveillance cameras in and around Ms. Haynes's home. App. 3. The cameras eventually captured Ms. Bond opening Ms. Haynes's mailbox, stealing a business envelope, and stuffing potassium dichromate inside the muffler of

Ms. Haynes's car. *Id.* On June 7, 2007, postal inspectors arrested Ms. Bond and executed search warrants on her house and car. They then took Ms. Bond into custody, where she signed a statement admitting that she had taken chemicals from Rohm & Haas. *Id.*

Ms. Bond's arrest was a shock to her friends and family, who believed that the attempted assaults were completely out of character. App. 68–72. An expert later performed a mental health evaluation on Ms. Bond and concluded that she had "committed the crimes [that] resulted in her arrest while suffering from a significantly reduced mental capacity" resulting from an "intense level of anxiety and depression." App. 73. The expert also opined that Ms. Bond was "not likely to recidivate." *Id.*

B. The Federal Indictment

Domestic disputes resulting from marital infidelities and culminating in a thumb burn are appropriately handled by local law enforcement authorities. While there certainly would be a role for local prosecutors to exercise appropriate prosecutorial discretion, no one would dispute that Ms. Bond's conduct likely violates one or more Pennsylvania statutes, including statutes that criminalize simple assault, *see* 18 Pa. Cons. Stat. § 2701, aggravated assault, *see* 18 Pa. Cons. Stat. § 2702, and harassment. *See* 18 Pa. Cons. Stat. § 2709. Indeed, Ms. Bond accepted full responsibility for her actions and was willing to plead guilty and face whatever punishment her community was prepared to mete out. Ms. Bond's defense counsel accordingly urged the federal authorities to transfer the case to local law

enforcement for prosecution and punishment under state law. That request was denied.

An Assistant United States Attorney instead prosecuted Ms. Bond under a novel theory that she had violated 18 U.S.C. § 229(a)(1), a federal statute implementing the United States' treaty obligations under the 1993 Chemical Weapons Convention. App. 37–42. That treaty, formally entitled the "Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction," is an arms-control agreement intended to address the proliferation of weapons of mass destruction and to prohibit nation states from using chemical weapons. App. 37 (Preamble). The treaty embodies a pledge by its signatory states never to develop or use chemical weapons, to destroy any existing chemical weapon stockpiles, and to avoid militarizing chemicals or using riot control agents as a method of warfare. App. 39 (Article I). As the International Committee of the Red Cross has explained, the treaty reinforces the 1924 Geneva Protocol prohibiting chemical and biological warfare, and "belongs to the category of instruments of international law that prohibit weapons deemed particularly abhorrent." ICRC Advisory Serv. on Int'l Humanitarian Law, *Fact Sheet: 1993 Chemical Weapons Convention* (2003), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/57JR8F. The treaty's Article VII requires state signatories to enact domestic legislation prohibiting persons in their territories from engaging in activities that the treaty prohibits participating states from undertaking. App. 40–42.

The United States ratified the Chemical Weapons Convention on April 25, 1997, and implemented associated legislation through Public Law No. 105-277, Executive Order 13128, and the Chemical Weapons Convention Implementation Act of 1998, 22 U.S.C. §§ 6701–6771. Consistent with its obligations under Article VII of the Convention, Congress also enacted penal legislation, codified at 18 U.S.C. § 229, granting federal courts authority over any statutory violations occurring within the United States. *See* 18 U.S.C. § 229(c). The statute's section 229(a)(1) provides that "it shall be unlawful for any person knowingly ... to ... acquire ... own, possess, or use ... any chemical weapon." *Id.* § 229(a)(1). The statute defines "chemical weapon" to mean any "toxic chemical and its precursors, except where intended" for "any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity." *Id.* § 229F(1)(A), (7)(A). In turn, the statute broadly defines "toxic chemical" to include "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." *Id.* § 229F(8)(A).

Section 229 thus sweeps broadly to criminalize any conduct involving a toxic chemical used for any non-peaceful purpose. Unlike other federal statutes that address assaultive conduct, section 229 includes no requirement that the alleged assault occur within the special jurisdiction of the United States, that the assault have an effect on interstate commerce, that the victim be a person or institution with recognized federal status, or that some other legitimate federal interest be involved. *See, e.g.*, 18 U.S.C. §§ 111–115,

1951, 2111, 2113, 2114.3, 2332a. The statute appears to be somewhat unique insofar as it includes no requirement that the government prove a federal interest as an element of the offense.

Ms. Bond's assault against her husband's paramour did not involve stockpiling chemical weapons, engaging in chemical warfare, or undertaking any of the activities prohibited to state signatories under the Chemical Weapons Convention. Nonetheless, the Assistant United States Attorney decided to prosecute Ms. Bond under 18 U.S.C. § 229. On September 5, 2007, a grand jury in the Eastern District of Pennsylvania returned an indictment charging Ms. Bond with two counts of knowingly acquiring, transferring, receiving, retaining, or possessing a chemical weapon that is "a toxic chemical" not intended "to be used for a peaceful purpose" within the meaning of 18 U.S.C. § 229F(7)(A). *See* App. 4. The grand jury's indictment also charged Ms. Bond with two counts of mail theft in violation of 18 U.S.C. § 1708.

C. The Proceedings Below

In the district court Ms. Bond moved to suppress certain evidence and to dismiss the two chemical weapons counts under 18 U.S.C. § 229(a)(1). Ms. Bond argued that 18 U.S.C. § 229 exceeded the federal government's enumerated powers, violated bedrock federalism principles guaranteed under the Tenth Amendment, and impermissibly criminalized conduct that lacked a nexus to any legitimate federal interest. App. 7. She also argued that the statute should be struck down as unconstitutionally vague, and contended that the affidavits used to support the search

warrants failed to establish probable cause. *See* App. 4, 7.

On November 19, 2007, the district court denied Ms. Bond's motions. App. 36. In a ruling from the bench, the district court accepted the government's argument that 18 U.S.C. § 229 did not violate federalism principles because the statute "was enacted by Congress and signed by the President under the necessary and proper clause of the Constitution ... [t]o comply with the provisions of a treaty." App. 28. The district court also ruled that the statute was not impermissibly vague, and held that the search warrants were properly issued. *See* App. 28–30.

On December 5, 2007, Ms. Bond pleaded guilty to all four counts of the indictment, but reserved her right to appeal the district court's ruling on her pretrial motions to dismiss and suppress. *See* App. 46–47. On June 3, 2008, the district court held a sentencing hearing. At that hearing, it enhanced Ms. Bond's offense level under the sentencing guidelines based on a determination that, although she was only a low-level technician at Rohm & Haas, she had used a "special skill" in selecting chemicals that were toxic through topical exposure. *See* App. 5. The district court then sentenced Ms. Bond to six years in prison, with five years of supervised release, and ordered her to pay a $2,000 fine and restitution in an amount of $9,902.79. *See id.* (Had Ms. Bond been convicted under state law for aggravated assault, she likely would have faced a prison sentence of between 3 and 25 months. *See* 18 Pa. Cons. Stat. § 2702(a)(4); 204 Pa. Code § 303.13.)

Ms. Bond filed a timely appeal with the U.S. Court of Appeals for the Third Circuit. *See* App. 1. The court of appeals recognized that Ms. Bond's Tenth Amendment claim raised important issues concerning the scope of Congress's authority under the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 2, to effectuate the federal treaty power. *See* App. 9–10. Describing the question as an issue of first impression, the Third Circuit acknowledged that it was unclear how far treaty-implementing legislation may intrude into areas over which the states possess primary authority. *See id.* (citing *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)). The court of appeals also recognized that Ms. Bond's Tenth Amendment claim would require the court to "wade into the debate over the scope and persuasiveness of" this Court's 1920 decision in *Missouri v. Holland*, 252 U.S. 416 (1920). App. 10. It noted the "significant scholarly debate" over whether *Holland* was correctly decided and "mounting interest for reconsideration of the rationale for *Holland*'s holding." App. 10 & n. 4.

The Third Circuit ultimately declined, however, to reach the merits of Ms. Bond's constitutional arguments. Instead, it chose to resolve the case on grounds never raised by any of the parties. In particular, the Third Circuit reached the startling conclusion that a criminal defendant convicted under a federal statute lacks standing to challenge that statute as beyond Congress's power to enact or otherwise inconsistent with the Tenth Amendment. *See* App. 14. The lower court thus held that Ms. Bond had no standing to challenge 18 U.S.C. § 229, even though she argued that her indictment and conviction were unlawful because, as applied to her,

the statute impermissibly exceeded Congress's delegated authority.

In reaching this counterintuitive conclusion, the Third Circuit observed that the "courts of appeals are split on whether private parties have standing to challenge a federal act on the basis of the Tenth Amendment." App. 12. The court of appeals recognized that the Seventh and Eleventh Circuits, relying on *New York v. United States*, 505 U.S. 144 (1992), have held that the "Tenth Amendment, although nominally protecting state sovereignty, ultimately secures the rights of individuals," and so individuals have standing to raise Tenth Amendment objections. App. 13 (quoting *Gillespie v. City of Indianapolis*, 185 F.3d 693, 703 (7th Cir. 1999)). Nonetheless, the Third Circuit joined other circuits in deeming itself bound by this Court's decision in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939). In the Third Circuit's view, the "holding of *Tennessee Electric*" directly applies to the facts of Ms. Bond's case and is therefore "binding irrespective" of the Court's more recent precedents. App. 15. Accordingly, recognizing that only this Court enjoys the prerogative of overruling its own precedents, the Third Circuit held that a private party lacks standing to pursue a Tenth Amendment challenge to a federal statute, "absent the involvement of a state or its officers as a party or parties" to the litigation. App. 14.

The Third Circuit deemed it significant that the state was "notably absent" from Ms. Bond's challenge and that Ms. Bond had not argued that her interests were aligned with those of the state.

See App. 15. The court reasoned that denying Ms. Bond the right to challenge the constitutionality of the federal statute under which she was convicted would not deprive her of a meaningful remedy. Instead, according to the Third Circuit, if a state "refuses to prosecute a viable Tenth Amendment claim, the citizens of the state may have recourse to local political processes to effect change in the state's policy of acquiescence." App. 16 n.8 (quoting *Medeiros v. Vincent*, 431 F.3d 25, 35 (1st Cir. 2005)). The Third Circuit never addressed the bedrock principle that a "departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *New York*, 505 U.S. at 182. Nor did it address Ms. Bond's practical argument that state officials lack the resources and interest to protect individual citizens, like Ms. Bond, from improper federal prosecutions.

The court of appeals denied a timely petition for rehearing and rehearing en banc on December 10, 2009. *See* App. 25. This petition follows.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted for three reasons. *First*, the Third Circuit's decision deepens a long-standing, well-recognized conflict in the courts of appeals concerning whether a private party convicted under a federal criminal statute has standing to challenge the statute as unconstitutional as beyond Congress's enumerated powers and inconsistent with the Tenth Amendment. *Second*, the Third Circuit's decision misconstrues this Court's precedents as creating improper standing barriers to parties who are not raising generalized grievances or arguments that uniquely belong to the state as sovereign, but who are instead suffering concrete, particularized injury from being prosecuted and incarcerated under federal statutes that exceed constitutional bounds. *Third*, the question presented raises an important, recurring issue. The Court's intervention is required to restore a judicial check on the improper federalizing of state and local crimes by providing much-needed guidance on the circumstances in which defendants have standing to challenge their convictions under unconstitutional federal legislation.

I. The Third Circuit's Decision Deepens An Acknowledged Split In Authority Among The Courts of Appeals.

As the Third Circuit expressly recognized below, and as other courts have also recognized, the "courts of appeals are split over whether private parties have standing to challenge a federal act on the basis of the Tenth Amendment." App. 12; *see also United States v. Hacker*, 565 F.3d 522, 526 (8th Cir. 2009) (discussing split in authority); *Lomont v. O'Neill*,

285 F.3d 9, 13 n.3 (D.C. Cir. 2002) (noting unsettled and "uncertain" state of the law with "appellate and district court cases on both sides of the issue"). This well-recognized conflict within the lower courts means that, in some circuits, criminal defendants can mount Tenth Amendment challenges to convictions obtained under federal statutes, while in others, similarly situated criminal defendants have no standing to argue that the very statute under which they have been convicted is unconstitutional and beyond Congress's power to enact.

The root of this lower-court confusion is this Court's seventy-one-year-old decision in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939). In that case, the Court rejected a challenge by public utilities to the generation and sale of electric power by the Tennessee Valley Authority, in which the utilities claimed that the Authority's actions could not be upheld "without permitting federal regulation of purely local matters reserved to the states or the people by the Tenth Amendment." *Id.* at 143. In a single sentence that has become an enduring source of controversy, this Court intimated that only a state or its officials had standing to raise a Tenth Amendment claim of intrusion into state sovereignty. *Id.* at 144 ("appellants, absent the states or their officers, have no standing"). Whether that sentence was "essential to" the Court's "holding and thus binding," *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 235 (2d Cir. 2006), or merely "confusing dicta" overtaken by subsequent decisions, is the subject of vigorous disagreement among the lower courts. *See* Ara B. Gershengorn, *Private Party Standing to*

Raise Tenth Amendment Commandeering Challenges, 100 Colum. L. Rev. 1065, 1073 (2000).

On one side of the divide, two circuits—the Seventh Circuit and the Eleventh Circuit—have permitted private parties to challenge federal statutes as unconstitutional under the constitutional principles embodied in the Tenth Amendment. *See Gillespie v. City of Indianapolis*, 185 F.3d 693, 703–04 (7th Cir. 1999); *Atlanta Gas Light Co. v. U.S. Dep't of Energy*, 666 F.2d 1359, 1368 n.6 (11th Cir. 1982); *see also Metrolina Family Prac. Group v. Sullivan*, No. 90-2320, 1991 WL 38691, at *1 (4th Cir. Mar. 25, 1991) (per curiam) (permitting plaintiffs to "assert that the medicare provisions infringe upon state sovereignty under the Tenth Amendment"). These courts have recognized that, when asserting a Tenth Amendment claim, a private party is not necessarily asserting an undifferentiated generalized grievance or seeking to enforce the rights of the state qua state, but rather asserting her own rights to be free from the constraints of unconstitutional federal legislation. *Gillespie*, 185 F.3d at 703 (the Tenth Amendment "nominally protect[s] state sovereignty" but "ultimately secures the rights of individuals"). Relying on *New York v. United States*, 505 U.S. 144 (1992), and emphasizing developments in this Court's standing jurisprudence, these courts have recognized the bedrock principle that the "Constitution divides authority between federal and state governments for the protection of individuals." *Id.* at 181. More directly, in these circuits, criminal defendants do not face the almost unimaginable retort that they do not suffer a sufficiently individualized injury in fact when they are

sentenced to prison for a crime under a statute that Congress arguable lacks authority to enact. The idea that the state that could have prosecuted the individual under its police power—but not the incarcerated individual—has standing borders on the absurd, but it is the law in a majority of circuits.

The approach taken by the Seventh and Eleventh Circuits stands in direct conflict with the Third Circuit's decision below and with decisions from five other courts of appeals holding that private parties do not have standing to challenge federal statutes under the Tenth Amendment. *See United States v. Hacker*, 565 F.3d 522, 525–27 (8th Cir. 2009); *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 971–72 (9th Cir. 2009); *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 234–35 (2d Cir. 2006); *Medeiros v. Vincent*, 431 F.3d 25, 33–36 (1st Cir. 2005); *United States v. Parker*, 362 F.3d 1279, 1284–85 (10th Cir. 2004). Few, if any, of these courts have embraced this counterintuitive conclusion with enthusiasm. But they view themselves as constrained by the Court's decision in *Tennessee Electric*.

Like the Third Circuit below, these other courts of appeals have recognized that standing rules have evolved since *Tennessee Electric*. *See* App. 16; *see also Brooklyn*, 462 F.3d at 236 (recognizing that "construing *New York* to diminish the weight" of *Tennessee Electric*'s "reasoning is one possible reading of the case"). Nonetheless, they have largely declined to analyze the constitutional principles undergirding the Court's standing doctrine. Instead, they have concluded that no analysis is required because they are bound by *Tennessee Electric*.

Noting that the Court has not overturned *Tennessee Electric* and that there is "no directly contradictory authority," *Hacker*, 565 F.3d at 526, these courts have declared that they are bound by precedent to deny standing to private parties challenging federal statutes under the Tenth Amendment. *See* App. 14. In reaching this conclusion, they have relied on this Court's oft-repeated admonition that when a precedent has "direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving" to this Court "the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). This reliance on *Shearson* underscores that this acknowledged and deep split among the courts of appeals can only be resolved by the Court's intervention.

Confirming that this division in authority is both significant and real, seven years ago this Court granted *certiorari* in *Pierce County v. Guillen*, 537 U.S. 129 (2003), to address the precise issue raised in this case—namely, "whether private parties have standing to challenge a federal act on the basis of the Tenth Amendment." After the parties briefed that question on its merits, the Court ultimately declined to resolve the issue because it was not addressed in the court of appeals' decision and did not have to be reached in light of the other question presented. *Pierce County*, 537 U.S. at 148 n.10. Since *Pierce County*, the split in authority among the lower courts has only deepened. *See, e.g.*, *Brooklyn*, 462 F.3d at 236. The reasons compelling this Court's review are thus even stronger now than

they were in 2003. Moreover, the stakes here—an individual's ability to challenge the deprivation of her liberty as compared to the privileged status of transportation safety records in state court—are significantly greater.

II. The Third Circuit's Decision Misconstrues This Court's Precedents.

In addition to deepening an existing conflict among the courts of appeals, the decision below misconstrues this Court's *Tennessee Electric* decision. Regardless whether *Tennessee Electric*'s discussion of standing is relevant when a party brings an undifferentiated, generalized grievance about federal intrusions into the prerogatives of state government, or when a case implicates a unique attribute of state sovereignty (such as the location of the state capital), the decision does not apply to deny standing to private parties who have suffered concrete, particularized injury because they are being prosecuted under an unconstitutional federal statute.

This Court has long expressed concern about attempts by private parties to convert the judiciary "into an open forum for the resolution of political or ideological disputes about the performance of government." *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring). The Court has therefore distinguished between litigants who allege concrete, personalized injury from those who assert merely an "undifferentiated, generalized grievance." *Lance v. Coffman*, 549 U.S. 437, 442 (2007); *Flast v. Cohen*, 392 U.S. 83, 88 (1968); *see also Dillard v. Chilton County Comm'n*, 495 F.3d 1324, 1335 (11th Cir. 2007) (denying private parties

standing to raise Tenth Amendment claim because they alleged only an "undifferentiated, generalized grievance"). A plaintiff who raises "only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 601 (2007) (plurality opinion) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–574 (1992)). Similarly, even if a party satisfies Article III's requirements, there may be prudential reasons to deny standing if the party is resting his claim to relief on the legal rights and interests of third parties. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 80 (1978); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11–13 (2004).

But this Court has also recognized that, when a plaintiff has a particularized stake in the litigation and is asserting her own legal rights, there is no standing bar insulating federal statutes from judicial review. *See Lance*, 549 U.S. at 442. Nor does it make any difference whether a state has consented or failed to object to overreaching federal intrusions into areas of traditional state concern. While one can imagine issues that uniquely concern the State's sovereign interests, the interest in not being deprived of liberty by a federal statute that exceeds Congress's enumerated powers is surely not among them. The Constitution "does not protect the sovereignty of the States for the benefit of the States or state governments as abstract legal entities"—to the contrary, "the Constitution divides authority

between federal and state governments for the protection of individuals." *New York*, 505 U.S. at 181–82 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961)).

The United States Solicitor General recognized this fundamental point in his merits brief in *Pierce County v. Guillen*, 537 U.S. 129 (2003). *See* Brief for the United States, *Pierce County* (No. 01-1229), 2002 WL 1560236. In doing so, the Solicitor General articulated a position in tension with the position taken by the government in the proceedings below.

The Solicitor General argued in *Pierce County* that *Tennessee Electric* did *not* deprive the private party of standing to plead a Tenth Amendment violation. In the Solicitor General's view, the private party had standing because the party was not raising a generalized grievance about a federal statute's inference with state sovereign prerogatives. Instead, the gravamen of the private party's complaint was that the statute exceeded "the permissible reach of Congress's Article I powers" because it was unrelated to "any legitimate federal interest." Brief for the United States, *Pierce County* (No. 01-1229), 2002 WL 1560236, at *25. The Solicitor General observed that this Court has "adjudicated numerous cases in which federal statutes were challenged as lying beyond the reach of Congress's Commerce Clause power, even when the State where the regulatory activity took place raised no objection to the statute." *Id.* (citing *United States v. Lopez*, 514 U.S. 549 (1995); *Perez v. United States*, 402 U.S. 146 (1971)). And he specifically noted that, because the federal statute operated

"directly on individual litigants" (in that case, by depriving them of a state-created right to obtain certain information), "adversely affected individual litigants" had standing to "raise a constitutional challenge." *Id.* at 27.

The principles recognized by the Solicitor General in *Pierce County* apply with even greater force here. Ms. Bond is not raising an undifferentiated, generalized grievance concerning the conduct of government or complaining broadly that a federal statute interferes with state prerogatives. Her concern is not some abstract idea that the state should take greater umbrage at a federal intrusion. Instead, she is raising the most concrete, particularized objection imaginable: she should not be locked in federal prison for six years for allegedly violating a chemical-weapons statute that, as applied to her conduct, greatly exceeds Congress's enumerated powers and is unrelated to any legitimate federal interest. Because there can be no dispute that the federal statute has directly caused Ms. Bond particularized harm—it is hard to imagine a more particularized injury in fact—she is an "adversely affected" litigant with standing to challenge the statute as unconstitutional under the Tenth Amendment.

III. The Third Circuit's Decision Raises Important Constitutional Issues That Can Be Resolved Only By This Court.

Apart from resolving a well-entrenched circuit split and correcting the Third Circuit's doctrinal departures, the Court's review is needed more broadly to clarify the circumstances in which criminal defendants have standing to challenge

federal criminal statutes. As the Third Circuit recognized, Ms. Bond has raised serious questions concerning the constitutionality of 18 U.S.C. § 229(a). *See* App. 9–10. But those questions will never be resolved, and the statute will continue to be applied unconstitutionally, if Ms. Bond and other defendants lack standing to challenge their convictions on constitutional grounds.

There is persistent concern, voiced in a variety of contexts, that the federal government is federalizing local and traditional state crimes. *See, e.g.*, Matthew H. Blumenstein, Note, *RICO Overreach: How The Federal Government's Escalating Offensive Against Gangs Has Run Afoul Of The Constitution*, 62 Vand. L. Rev. 211, 217 (2009); Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 3 (1997); John Panneton, *Federalizing Fires: The Evolving Federal Response to Arson Related Crimes*, 23 Am. Crim. L. Rev. 151 (1985). The growth of federal power in the area of criminal law creates unnecessary strains on the federal justice system while sapping the ability of states to "exercise discretion in a way that is responsive to local concerns." Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1173 (1995). Federal criminal statutes can also create "dramatically disparate treatment of similarly situated offenders, depending on whether they are prosecuted in federal or state court." Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643, 646 (1997).

For these reasons and others, members of this Court "have repeatedly argued against the federalization of traditional state crimes and the extension of federal remedies to problems for which the States have historically taken responsibility and may deal with today if they have the will to do so." *United States v. Morrison*, 529 U.S. 598, 636 n.10 (2000) (Souter, J., dissenting). And the Court has policed impermissible federal encroachments on state authority over "traditionally local criminal conduct." *Jones v. United States*, 529 U.S. 848, 858 (2000) (barring federal prosecution of arson because "arson is a paradigmatic common-law state crime"); *Lopez*, 514 U.S. at 561 n.3 (invalidating statute federalizing the crime of possessing firearms near schools in part because area is one of traditional state concern).

This vigilance is especially important where, as here, the expansion of federal criminal law is one in which state officials may well acquiesce and cannot be relied upon to protect the interests of their citizens. *See New York*, 505 U.S. at 182 (noting "powerful incentives" that might lead state officials "to view departures from the federal structure to be in their personal interests"). The Third Circuit asserted that Ms. Bond still has a meaningful remedy because "the citizens of th[e] state may have recourse to local political processes to effect change" in the state's failure to object to her conviction. App. 16 n.8. But that assertion simply cannot be reconciled with the real-world circumstances of this case, or almost any other case involving a federal criminal prosecution.

No one can reasonably expect states or their citizens to rise up to challenge the constitutionality of Ms. Bond's unlawful conviction. Unlike federal statutes that impinge on a state's prerogatives, a state has few incentives to object to federal laws that serve to relieve a state from its responsibilities. *See Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion) ("preventing and dealing with crime is ... the business of the States") (quoting *Patterson v. New York*, 432 U.S. 197, 201 (1977)). In particular, as state budgets are constrained, state governments may well prefer to allow the federal government to take responsibility for prosecuting and punishing local crimes and to take over the state's obligations to administer "private justice between the citizens of the same state." The Federalist No. 17, at 118 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Because states have an incentive to acquiesce in the federalization of state and local crimes, denying criminal defendants standing to challenge the constitutionality of the federal statutes under which they are prosecuted threatens to upend the constitutional balance and leave unchecked expansions in federal criminal law.

The Third Circuit's decision below vividly illustrates this threat. Ms. Bond's failed assault on her husband's paramour is precisely the type of domestic dispute that should have been handled by local authorities with an appreciation for the local community's views on the condign punishment for the crimes that Ms. Bond committed. Decisions in this case should not have been made by a federal prosecutor under a far-fetched theory that Ms. Bond's assault violated a federal statute implementing the United States' obligations to

prevent the proliferation of chemical and biological weapons. Moreover, in denying Ms. Bond standing to challenge this obvious overreach, the Third Circuit avoided addressing what it acknowledged was an "issue[] of first impression" and the subject of "significant scholarly debate" over "how far" federal treaty-implementing legislation "may reach into an area over which states possess primary authority." App. 9–10 & n.4. That outcome not only misconstrues this Court's precedents, but it effectively ensures that substantial departures from our constitutional scheme will never be efficiently remedied.

The Third Circuit's decision should not be allowed to stand. Instead, the Court should grant review, so it may reverse and remand for the lower court to conduct a full and proper consideration of Ms. Bond's weighty constitutional arguments.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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April 9, 2010

APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-2677

UNITED STATES of America,
Appellee,

v.

Carol Anne BOND,
Appellant.

Argued March 23, 2009
Filed Sept. 17, 2009

Before RENDELL, AMBRO, and JORDAN,
Circuit Judges.

OPINION OF THE COURT

AMBRO, *Circuit Judge.*

Carol Anne Bond pled guilty to two counts of possessing and using a chemical weapon, and two counts of mail theft, in connection with her efforts to harm a former friend. She now appeals the District Court's pretrial order denying her motions to dismiss the charges against her and to suppress evidence. She also challenges her sentence. For the reasons that follow, we affirm each of the Court's actions.

I. Factual and Procedural Background

Bond was excited when her closest friend, Myrlinda Haynes, announced that she was pregnant. Bond's excitement turned to rage when she learned that her husband, Clifford Bond, was the child's father. She vowed revenge.

Planning to poison Haynes, Bond (a trained microbiologist) stole a quantity of 10-chloro10H-phenoxarsine from her employer, the chemical manufacturer Rohm and Haas, and ordered over the Internet a vial of potassium dichromate. These chemicals have the rare ability to cause toxic harm to individuals through minimal topical contact.[1]

Bond attempted to poison Haynes with the chemicals at least 24 times over the course of several months. She often would spread them on Haynes's home doorknob, car door handles, and mailbox. Haynes noticed the chemicals and usually avoided harm, but on one occasion sustained a chemical burn to her thumb.

Haynes called her local police about the chemical attacks. They suggested that the substance might be cocaine and told Haynes to clean her car and door handles on a regular basis. Unsatisfied (to say the least) with this response, Haynes complained to her local postal carriers about the chemicals on her

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[1] Half a teaspoon of 10-chloro-10H-phenoxarsine ingested is lethal to an adult, while a few crystals of the substance is highly toxic. The same is true for potassium dichromate, with less than one-quarter of a teaspoon ingested being lethal and an even smaller number of crystals is toxic. App. at 239-56.

mailbox. They referred the matter to the United States Postal Inspection Service.

Based on Haynes's complaint, postal inspectors placed surveillance cameras in and around Haynes's home. These cameras captured Bond opening Haynes's mailbox, stealing a business envelope, and placing potassium dichromate inside Haynes's car muffler. They specifically showed Bond going back and forth between her car and Haynes's with the chemicals.

After testing the chemicals that Bond placed in Haynes's muffler, postal inspectors attempted to trace their origin to the Rohm and Haas center where Bond worked as a technical assistant. The inspectors determined that nearly four pounds of potassium dichromate were missing from a common storage area to which Bond had access.

With this information, the inspectors sought and received an arrest warrant for Bond and search warrants for her car and home. They supported their warrant requests with an affidavit detailing the gathered evidence, including the videotaped footage, results of the chemical analyses, and the report of the missing chemicals. The affidavit also explained Bond's responsibilities at Rohm and Haas, described her car and home, and noted that Haynes had identified Bond from a photo array.

Postal inspectors arrested Bond and took her to a holding cell in the Philadelphia Post Office. Once there, Bond acknowledged and waived her constitutional rights, and admitted to taking the chemicals from Rohm and Haas. Meanwhile, other inspectors executed the search warrants, finding a

piece of Haynes's mail and amounts of the chemicals in Bond's home and car.

A grand jury in the Eastern District of Pennsylvania charged Bond with two counts of possessing and using a chemical weapon, in violation of 18 U.S.C. § 229(a)(1), a criminal statute implementing the treaty obligations of the United States under the 1993 Chemical Weapons Convention. The grand jury also charged Bond with two counts of mail theft, in violation of 18 U.S.C. § 1708.

Bond moved to suppress certain evidence and to dismiss the two chemical weapons charges. She claimed that the affidavits supporting the search warrants failed to establish probable cause to search her home and car, and she argued that 18 U.S.C. § 229 is unconstitutional because it violates principles of federalism embodied in our Constitution and the fair notice requirements of its Due Process Clause.

The District Court denied Bond's motions. It ruled that § 229 did not impinge on principles of federalism because it "was enacted by Congress and signed by the President under the necessary and proper clause of the Constitution ... [to] comply with the provisions of a treaty." App. 168. The Court next concluded that "the statute is not vague, [because] it is clear that if anybody uses a toxic chemical for other than peaceful purposes, th[at] person can be prosecuted." *Id.* at 169. It ruled as well that "the search warrants were properly issued," because sufficient evidence existed to permit a "probable cause conclusion that a substantial amount of

potassium dichromate would probably be found in [Bond's] vehicle or where she lived." *Id.* at 170-72.

Following the Court's denial of her motions, Bond pled guilty to all charges, reserving her right to appeal. The Court then held a sentencing hearing at which it enhanced Bond's total offense level by two levels based on a determination under U.S.S.G. § 3B1.3 that she used a special skill in the commission or her offense. The Court ultimately sentenced Bond to six years' imprisonment, five years of supervised release, a $2,000 fine, and restitution of $9,902.79. Bond appeals.

II. Jurisdiction and Standard of Review

The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

We review *de novo* a challenge to the constitutionality of a criminal statute. See *De Leon-Reynoso v. Ashcroft*, 293 F.3d 633, 635 (3d Cir. 2002). We consider "denial of a motion to suppress for clear error as to the underlying factual findings and exercise[ ] plenary review of the District Court's application of the law to those facts." *United States v. Perez*, 280 F.3d 318, 336 (3d Cir. 2002). We likewise review *de novo* the District Court's interpretation of the Sentencing Guidelines and consider its related findings of fact for clear error. *See United States v. Wood*, 526 F.3d 82, 85 (3d Cir. 2008).

III. Discussion

Bond claims that (1) 18 U.S.C. § 229 is unconstitutional, (2) the search warrants for her home and car were invalid, and (3) her conduct did

not justify a sentence enhancement for using a special skill in the commission of a crime. We reject each of these claims.

A. Constitutionality of 18 U.S.C. § 229

The United States, along with many other nations, signed the Chemical Weapons Convention in 1993 to ensure "the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons...." 32 I.L.M. 800, 804 (1993). This treaty states, among other things, that each signing nation "shall[,] in accordance with its constitutional process, adopt the necessary measures to implement its obligations under this Convention." *Id.* at 810. It specifically requires a complying nation to "[p]rohibit natural and legal persons anywhere on its territory ... from undertaking any activity prohibited ... under this Convention, including enacting penal legislation with respect to such activity." *Id.*

The United States fulfilled its responsibilities under the treaty through the Chemical Weapons Convention Implementation Act of 1998, 22 U.S.C. § 6701, and the Act's associated penal provision, 18 U.S.C. § 229. In relevant part, § 229 reads:

> (a) Unlawful Conduct — Except as provided in subsection (b), it shall be unlawful for any person knowingly-
>
> (1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; or

> (2) to assist or induce, in any way, any person to violate paragraph (1), or to attempt to conspire to violate paragraph (1).

18 U.S.C. § 229(a). "Chemical weapon" is defined as a "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose." *Id.* at § 229F(1)(A). "Toxic chemical" is defined in part as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." *Id.* at § 299F(8)(A). Importantly, § 229 neither has a requisite federal interest element (*i.e.*, a requirement that an offender's conduct affect interstate commerce or a federal person, possession, or interest) nor states a basis for its enactment beyond the Chemical Weapons Convention (*i.e.*, it does not assert authority under the Commerce Clause or other constitutional provision).

Based on this framework, Bond asserts that § 229 violates constitutional principles of federalism because it is not "based on a valid exercise of constitutional authority," and does not "require proof of a federal interest." Bond's Br. at 10. She also claims that the provision is unconstitutionally vague and overbroad "by virtue of its enormous scope" and its failure to "provide fair notice" of the conduct covered by its terms. *Id.* at 28.

1. Federalism Challenge

"Under our federal system[,] the administration of criminal justice rests with the States except as Congress, acting within the scope of [its] delegated

powers, has created offenses against the United States." *Screws v. United States*, 325 U.S. 91, 109, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945). Bond contends that, by permitting prosecution of "localized" offenses "without regard to the ... federalism boundaries enshrined in the Constitution[,]" § 229 "signals a massive and unjustifiable expansion of federal law enforcement into [the] state-regulated domain." Bond's Br. at 10-11, 16. Specifically, she argues that because the statute "brings citizens into the federal criminal area for conduct not properly the subject of federal prosecutors," *id.* at 11, and because it "significantly restrike[s] the delicate balance between the federal and state governments," it violates "the unique system of federalism" protected by the Tenth Amendment to the Constitution.[2] *Id.*

The Government responds that the Tenth Amendment is no impediment to the operation of § 229 because Congress had authority to enact it under the Necessary and Proper Clause of the Constitution as a law enforcing its Treaty Power.[3]

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[2] The Tenth Amendment provides in full: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

[3] The Necessary and Proper Clause gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* at art. I, § 8, cl. 2. The Treaty Power permits the President, "by and with the Advice and Consent of the Senate, to make

(Continued...)

Relying on *Missouri v. Holland*, 252 U.S. 416, 432, 40 S.Ct. 382, 64 L.Ed. 641 (1920), the Government asserts that § 229 need not be authorized by a specific power given to Congress, nor contain a requisite federal interest element, because the Chemical Weapons Convention is a valid treaty and "[i]f [a] treaty is valid there can be no dispute about the validity of the statute [implementing it] under Article I, § 8, as a necessary and proper means to execute the powers of the Government." Gov't's Br. at 27 (quoting *United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998). The Government highlights as well the declaration in *Holland* that "[i]t is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could." 252 U.S. at 433, 40 S.Ct. 382; *see also United States v. Lara*, 541 U.S. 193, 201, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004). Thus, states the Government, even if § 229 were "otherwise prohibited legislation" under the Tenth Amendment, "the treaty power invest[ed] Congress with independent authority to pass [it]." Gov't's Br. at 26.

These arguments appear to present issues of first impression in our Court. They raise questions about what constitutional authority treaty-implementing legislation must cite, and how far such legislation may reach into an area over which "[s]tates possess primary authority." *Brecht v.*

Treaties, provided two thirds of the Senators present concur...." *Id.* at art. II, § 2, cl. 2.

Abrahamson, 507 U.S. 619, 635, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). The arguments also ask us to wade into the debate over the scope and persuasiveness of the decision in *Holland*. *Compare United States v. Ferreira*, 275 F.3d 1020, 1027-28 (11th Cir. 2001) (applying *Holland* to hold that "because Congress's authority under the Necessary and Proper clause extends beyond those powers specifically enumerated in Article I, section 8, it may enact laws necessary to effectuate the treaty power" (internal quotations omitted)), *and Lue*, 134 F.3d at 84-85 (same), *with Oneida Indian Nation of New York v. New York*, 860 F.2d 1145, 1163 (2d Cir. 1988) (remarking that, despite *Holland*, the ability of the treaty power to override "state prerogatives" is uncertain).[4]

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[4] In addition, a significant scholarly debate exists over whether the Supreme Court correctly decided *Holland*. *Compare* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000) (asserting that constitutional history and "the fundamental principle of national supremacy" support Holland's recognition of broad congressional authority to enact treaty-enforcing legislation), *with* Nicholas Rosenkranz, *Executing the Treaty Power*, 118 Harv. L.Rev. 1867 (2005) (arguing that *Holland* "is wrong and ... should be overruled" because constitutional text, history, and structure, along with practical considerations, weigh against it). This debate suggests mounting interest for reconsideration of the rationale for *Holland*'s holding, especially arguments rooted in the text and history of the Constitution. *See* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L.Rev. 390, 391-402, 423-61 (1998); Rosenkranz, *supra*, at 1880-1918; Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 Colum. L.Rev. 403, 404-533 (2003).

But before we can reach the merits of these arguments, we must ensure that Bond has standing to raise a Tenth Amendment challenge to § 229. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (requiring that courts decide jurisdictional issues before considering the merits of a claim). Because this inquiry implicates our jurisdiction, we conduct it even though the parties did not address it in their initial briefs. *See Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 216 (3d Cir. 2003).[5]

In *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 143-144, 59 S.Ct. 366, 83 L.Ed. 543 (1939), utility companies chartered in Tennessee argued that the sale of electrical power by the federally chartered Tennessee Valley Authority was an impermissible federal regulation of a local matter in violation of the Tenth Amendment. The Supreme Court rejected this argument, concluding that the private companies lacked standing to maintain their claim:

> The sale of government property in competition with others is not a violation of the Tenth Amendment. As we have seen[,] there is no objection to the Authority's operations by the states, and, if this were not so, the [utility companies], absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] [A]mendment.

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[5] After identifying standing as an unresolved question in Bond's federalism challenge to § 229, we requested and received supplemental briefing from the parties.

Id. at 144, 59 S. Ct. 366.[6]

Despite this explicit holding, courts of appeals are split on whether private parties have standing to challenge a federal act on the basis of the Tenth Amendment. Two circuit courts have allowed private parties to bring such challenges. *See Gillespie v. City of Indianapolis*, 185 F.3d 693, 703-04 (7th Cir. 1999), cert. denied, 528 U.S. 1116, 120 S.Ct. 934, 145 L.Ed.2d 813 (2000); *Atlanta Gas Light Co. v. U.S. Dep't of Energy*, 666 F.2d 1359, 1368 n.16 (11th Cir. 1982).[7] Five have not. *See*

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[6] Bond argues that the language regarding private party Tenth Amendment standing in Tenn. Elec. Power Co. "is textbook dicta and thus does not bind this Court." Bond's Supp. Br. at 2. But "[t]he [Supreme] Court dismissed the Tenth Amendment claim after analyzing both the standing issue and the merits, and hence, the former holding is an alternative ground, rather than obiter dictum." *Medeiros v. Vincent*, 431 F.3d 25, 34 (1st Cir. 2005) (citing *California v. United States*, 438 U.S. 645, 689 n. 10, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978)). Furthermore, because the standing question in *Tenn. Elec. Power Co.* concerned the constitutional jurisdiction of a federal court, its resolution predominates any discussion of the merits. *See Steel Co.*, 523 U.S. at 94-95, 118 S.Ct. 1003.

[7] Since deciding *Atlanta Gas Light Co.*, the Eleventh Circuit has retreated somewhat from that case's determination-which did not consider the holding in *Tennessee Electric*-that private parties have standing to pursue a Tenth Amendment claim. *See Dillard v. Chilton County Comm'n*, 495 F.3d 1324, 1335 (11th Cir. 2007) (denying private parties standing to raise a Tenth Amendment claim because they expressed only an "undifferentiated, generalized grievance"); *Seniors Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1034 n.6 (11th Cir. 1992) (applying *Atlanta Gas Light Co.* "with admitted doubts").

United States v. Hacker, 565 F.3d 522, 525-527 (8th Cir. 2009); *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 971-72 (9th Cir. 2009); *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 234-35 (2d Cir. 2006), cert. denied, 552 U.S. 810, 128 S.Ct. 44, 169 L.Ed.2d 11 (2007); *Medeiros v. Vincent*, 431 F.3d 25, 33-36 (1st Cir. 2005), cert. denied, 548 U.S. 904, 126 S.Ct. 2968, 165 L.Ed.2d 951 (2006); *United States v. Parker*, 362 F.3d 1279, 1284-85 (10th Cir. 2004), cert. denied,543 U.S. 874, 125 S.Ct. 88, 160 L.Ed.2d 124 (2004).

The Seventh Circuit Court stated most clearly the rationale for permitting private parties, notwithstanding *Tennessee Electric*, to raise Tenth Amendment concerns absent the involvement of a state. Deciding that a state police officer had standing independently to maintain a Tenth Amendment claim against a federal gun regulation, the Court emphasized that "standing barriers have been substantially lowered in the decades since the Supreme Court decided [*Tennessee Electric*]." *Gillespie*, 185 F.3d at 700. It further explained that *New York v. United States*, 505 U.S. 144, 181-82, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), cabined the holding of *Tennessee Electric* by establishing that, "in making Tenth Amendment claims, [an individual] actually is asserting his own rights." Gillespie, 185 F.3d at 703. The Court based this explanation on the Supreme Court's statement in New York that "the Constitution divides authority between federal and state governments for the protection of individuals[,]" 505 U.S. at 181, 112 S.Ct. 2408, which convinced the Seventh Circuit panel that "the Tenth Amendment, although nominally protecting state sovereignty, ultimately

secures the rights of individuals." *Gillespie*, 185 F.3d at 703.

Contrary to this reasoning, the five circuit courts to reject independent private party standing for Tenth Amendment claims have focused on the continuing authority of *Tennessee Electric*. *See, e.g., Oregon*, 552 F.3d at 972; *Brooklyn Legal Servs. Corp.*, 462 F.3d at 234. Noting that the Supreme Court's "'decisions remain binding precedent until [it] see[s] fit to reconsider them,'" *Hacker*, 565 F.3d at 527 (quoting *Hohn v. United States*, 524 U.S. 236, 252-53, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998)), these courts have ruled that *Tennessee Electric* denies private plaintiffs standing for Tenth Amendment claims because there exists "no directly contradictory authority from the Supreme Court." *Id.* at 526. The courts also point to varying prudential considerations to support their determinations. *See, e.g., id.* at 527 (suggesting that the holding of *Tennessee Electric* comports with prudential standing principles that generally limit a plaintiff to asserting his own rights); *Medeiros*, 431 F.3d at 36 (hesitating to disregard *Tennessee Electric* because doing so might induce a "substantial increase in ... litigation before the federal courts").

We are persuaded by the reasoning advanced by the majority of our sister courts and conclude that a private party lacks standing to claim that the federal Government is impinging on state sovereignty in violation of the Tenth Amendment, absent the involvement of a state or its officers as a party or parties. "If a precedent of [the Supreme] Court has direct application in a case, yet appears

to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). The holding of *Tennessee Electric* thus is binding irrespective of the language in New York about federalism's "protection of individuals." *See Medeiros*, 431 F.3d at 34 (noting also that New York never actually dealt with the question of standing). Moreover, the fact that the Supreme Court in this decade granted certiorari on, but later declined to answer, the question of "whether private plaintiffs have standing to assert 'states' rights' under the Tenth Amendment," *Pierce County, Washington v. Guillen*, 537 U.S. 129, 148 n. 10, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003), does no more than indicate an interest of at least four Justices in *Tennessee Electric*'s binding status.

Our interpretation makes it evident that Bond lacks standing to pursue her Tenth Amendment challenge to § 229. The "requisite representation by the states or their officers is notably absent" from her suit, *Brooklyn Legal Servs. Corp.*, 462 F.3d at 234, and she does not even attempt to argue that her interests are aligned with those of a state. *Cf. Parker*, 362 F.3d at 1284 (speculating that a private party could assert a Tenth Amendment claim by showing that her claim "align[s] with the state's interest"). Accordingly, we will not reach the merits of Bond's arguments concerning the

constitutionality of § 229 under our federal system of government.[8]

2. Vagueness Claim

The remainder of Bond's constitutional challenge to 18 U.S.C. § 229 presents her claims that the statute is vague and overbroad. She asserts that because "[v]irtually any activity with a chemical ... can cause 'death, temporary incapacitation or permanent harm to humans or animals' ... [, d]efendants in good faith could easily be unsure about what conduct is prohibited" under the statute. Bond's Br. at 28 (quoting 18 U.S.C. § 229F(8)(A)).

A statute is unconstitutionally overbroad if it "does not aim specifically at the evils within the allowable area of control by the government, but ... sweeps within its ambit other constitutionally protected activities." *Waterman v. Farmer*, 183 F.3d 208, 212 n. 5 (3d Cir. 1999) (internal quotations omitted). "A statute is unconstitutionally vague if 'men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *McAllister v. Att'y Gen.*, 444 F.3d 178, 186 (3d Cir. 2006) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926)).

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[8] Despite Bond's suggestion to the contrary, see Bond's Supp. Br. at 4, our conclusion does not bar individuals from any recourse in the face of Tenth Amendment violations accepted by a state. As the First Circuit Court explained, "the State represents the interests of its citizens in general, and, if it refuses to prosecute a viable Tenth Amendment claim, the citizens of that state may have recourse to local political processes to effect change in the state's policy of acquiescence." *Medeiros*, 431 F.3d at 35.

"[O]utside of the First Amendment context, a party has standing to raise a vagueness challenge only if the challenged statute is vague as to that party's conduct." *United States v. Woods*, 915 F.2d 854, 862 (3d Cir. 1990).

Section 229, to repeat, closely adheres to the language of the Chemical Weapons Convention and states, in relevant part:

> (a) Unlawful Conduct-Except as provided in subsection (b), it shall be unlawful for any person knowingly-
>
> (1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; or
>
> (2) to assist or induce, in any way, any person to violate paragraph (1), or to attempt to conspire to violate paragraph (1).

It further defines a "chemical weapon" as a "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose." *Id.* at § 229F(1)(A).[9] And it

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[9] "[P]urpose[s] not prohibited under" § 229 include "individual self-defense devices," 18 U.S.C. § 229C, and:

> (A) Peaceful purposes. Any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.
>
> (B) Protected purposes. Any purpose directly related to protection against toxic chemicals and to protection against chemical weapons.
>
> (C) Unrelated military purposes....

(Continued...)

describes a "toxic chemical" as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." *Id.* at § 299F(8)(A).

While these terms are certainly broad, we conclude that they are neither vague as applied to Bond's actions nor overbroad in their relation to constitutionally protected behavior. *See McAllister*, 444 F.3d at 186. First, there is no doubt that "a person of reasonable intelligence" would know that Bond's conduct violated § 229.[10] Over a period of eight months, Bond researched, stole, and deployed highly toxic chemicals with the intent of harming Haynes. Any one of her attacks could have delivered a lethal chemical dose to Haynes or her then-infant child. Bond's actions thus clearly constituted unlawful possession and use of a chemical weapon under § 229.

Second, as even Bond notes, "[t]he statute casts a wide net for obvious reasons." Bond's Br. at 31. Though it potentially criminalizes the harmful use or production of chemicals found in "the cleaning supply aisles at the local grocery store," *id.*, it does not criminalize "protected acitivit [ies] outside the

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(D) Law enforcement purposes....

Id. at § 229F.

[10] Because Bond understandably does not claim that her chemical attacks on Haynes were expressive activities protected by the First Amendment, her vagueness challenge can succeed only if the statute is vague in its application to her specific conduct. *See United States v. Powell*, 423 U.S. 87, 92, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975).

permissible bounds of Congressional regulation." *McAllister*, 444 F.3d at 186. It therefore is not unconstitutionally overbroad.

B. Validity of Search Warrants

Aside from her constitutional challenge to § 229, Bond seeks to suppress the evidence gathered from her home and vehicle "[b]ecause no probable cause to search [them] existed." Bond's Br. at 33. Bond claims that the affidavit supporting the search warrants "lacked any statement as to why the affiant might have expected the desired evidence to be present at either location," and "provided no basis for the conclusion that [Bond] owned the specified vehicle or resided at the address provided." *Id.* at 34-35. These claims fail.

"To find probable cause to search, there needs to be a 'fair probability that contraband or evidence of a crime will be found in a particular place.' " *United States v. Burton*, 288 F.3d 91, 103 (3d Cir. 2002) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). To determine this, a court must consider the "totality of the circumstances," *Gates*, 462 U.S. at 238, 103 S.Ct. 2317, and need not conclude that it was "more likely than not" that the evidence sought was at the place described, *see Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983). We have explained that "[d]irect evidence linking the place to be searched to the crime is not required for the issuance of a search warrant." *United States v. Hodge*, 246 F.3d 301, 305 (3d Cir. 2001). This is because "probable cause can be, and often is, inferred by considering the type of crime, the nature of the items sought, the suspect's opportunity for

concealment and normal inferences about where a criminal might hide the fruits of his crime." *Id.*

In this case, Postal Inspectors described the following evidence to support search warrants for Bond's home and car: (1) the threats made by Bond to Haynes; (2) video coverage showing Bond stealing Haynes's mail, "placing a red powdery substance on the inside of ... Haynes's car muffler," and "going back and forth several times between her own car and ... Haynes's car"; (3) Bond's duties at Rohm and Haas and the report of the chemicals missing from its storage area; (4) Haynes's identification of Bond; (5) the inspectors' determination "that Carol Ann Bond is the owner of the 2007 Saturn Ion silver or grey 4 Door Sedan"; and (6) the specific location of Bond's home. App. at 29-31. This represented "an accumulation of circumstantial evidence that together indicates a fair probability of the presence of contraband at the home [and vehicle] of the arrested." *Burton*, 288 F.3d at 103.[11]

In sum, because "the Government proffered sufficient evidence in the ... affidavit that there was

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[11] Bond's possession and use of significant quantities of toxic chemicals additionally gave rise to probable cause that she was keeping them in her home. *Cf. Hodge*, 246 F.3d at 306 ("It is reasonable to infer that a person inv[olved] in drug dealing ... would store evidence of that dealing at his home."); *United States v. Whitner*, 219 F.3d 289, 297 (3d Cir. 2000) ("[E]vidence associated with drug dealing needs to be stored somewhere, and ... a dealer will have the opportunity to conceal it in his home. After all, a dealer logically could conclude that his residence is the best, and probably the only, location to store ... large quantities of drugs....").

a 'fair probability that contraband' would be found [in Bond's home and car], the warrant[s] [were] validly sought and approved, and we will not suppress the evidence that resulted from the search of that property." *Id.* at 105 (quoting *Gates*, 462 U.S. at 238, 103 S.Ct. 2317).

C. Appropriateness of "Special Skill" Sentence Enhancement

Bond's final challenge to the District Court's order concerns her two-level sentence enhancement under U.S.S.G. § 3B1.3 for using a special skill to facilitate the commission of a crime. She claims that this enhancement "reflects a misapplication of the sentencing guidelines and constituted clear error by the sentencing court." Bond's Br. at 40. We disagree.

Section 3B1.3 of the Sentencing Guidelines provides for a two-level enhancement where "the defendant ... used a special skill ... in a manner that significantly facilitated the commission or concealment of the offense." "The purpose of this section is to add to the punishment of those who turn legitimate special skills to the perpetration of evil deeds." *United States v. Mainard*, 5 F.3d 404, 406 (9th Cir. 1993); *see also United States v. Young*, 932 F.2d 1510, 1513 (D.C. Cir. 1991). Thus, a sentencing court is required to make two findings before imposing an upward adjustment for use of a special skill: "(1) the defendant possesses a special skill; and (2) ... used it to significantly facilitate the commission or concealment of the offense." *United States v. Batista De La Cruz*, 460 F.3d 466, 468 (3d Cir. 2006).

The application note to § 3B1.3 defines "special skill" as "a skill not possessed by members of the general public and usually requiring substantial education, training, or licensing." It further states that examples of individuals with special skills "include pilots, lawyers, doctors, accountants, chemists, and demolition experts." U.S.S.G. § 3B1.3 app. n. 4. "[A] § 3B1.3 sentence enhancement," however, "is not limited to persons who have received substantial formal education, training from experts, or who have been licensed to perform a special skill." *United States v. Urban*, 140 F.3d 229, 236 (3d Cir. 1998).

Bond argues that, despite her advanced degree in microbiology, she does not possess a special skill because she merely "was a low level technical analyst" at Rohm and Haas who "did not even use the two chemicals charged in the indictment." She emphasizes that "95% of the 20,000 chemicals [at Rohm and Haas] were listed on the company's computer where any employee could search the chemical by name, see where it was located, and 'go and borrow it.' " And she asserts that all Rohm and Haas employees "receive[d] safety training and learn[ed] how to read Material Safety Data Sheets ... [,] which are published for all chemicals available in the United States." Bond's Br. at 45.

These contentions fall far short of persuasive. With her degree and work experience, Bond has skills and knowledge "not possessed by members of the general public and usually requiring substantial education, training, or licensing." U.S.S.G. § 3B1.3 app. n.4. She is specifically trained in the development and application of biocides, which are

defined as "poisonous chemical substance[s] that can kill living organisms." Webster's New World Dictionary 75 (1966). She also is competent in working with chemicals and researching them according to their labeled qualities. Taken together, these attributes constitute a "special skill" for purposes of U.S.S.G. § 3B1.3.

With regard to the second prong of the special skill enhancement test, use of a special skill "in a manner that significantly facilitate[s] the commission or concealment of the offense" is proven by "a *direct* use of the special skill." *United States v. Hickman*, 991 F.2d 1110, 1113 (3d Cir. 1993) (emphasis in original). The First Circuit Court, for instance, held that a repairman of bank machines directly used his special skill when he caused the machines to malfunction in order to rob them. *See United States v. Aubin*, 961 F.2d 980, 984 (1st Cir. 1992). Even more pertinent, the Seventh Circuit Court held that a lab technician with a background in biology who ran a methamphetamine lab directly used his special skill in the commission of a crime. *See United States v. Fairchild*, 940 F.2d 261, 263-66 (7th Cir. 1991). The Court explained that the lab technician specifically had "used his knowledge of chemistry to purchase chemicals for his company, and put them together in the 'right combination' ... to make methamphetamine." *Id.* at 266.

Applying similar logic to Bond, it is apparent that she employed her special skill to select the unusually toxic chemicals she used against Haynes. In particular, her training and position allowed her to research and steal chemicals that were more toxic via topical exposure than ingestion. It also

facilitated her handling and deployment of the chemicals. Additionally, it is unquestionable that Bond's special skill influenced her decision to use toxic chemicals as her weapon of revenge. Poisoning one's rivals, of course, is nothing new. But attempting to do so through the systematic application of 10-chloro-10H-phenoxarsine is not an approach typically taken by members of the general public. Rather, as the District Court concluded, it reflects the plan and actions of an individual trained in the use of biocidal chemicals.

The District Court accordingly did not err in assigning Bond a two-level sentence enhancement for using a special skill "in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3. Bond's education and training constitute a special skill, and she directly used that skill committing her crime.

IV. Conclusion

Bond fell within the ambit of the federal chemical weapons statute by strategically employing toxic chemicals with the intent to harm Haynes. As a private party acting independently of a state, she lacks standing to challenge the constitutionality of this statute on the basis of the Tenth Amendment, and her claims that the statute is vague and overbroad fall short of the mark. Moreover, law enforcement personnel legally obtained the evidence that led to her indictment, and the special skill sentence enhancement that the District Court applied to Bond appropriately punished her offenses. For these reasons, we affirm the judgment of the District Court.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2677

UNITED STATES of America,
Appellee,

v.

Carol Anne BOND,
Appellant.

Before: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, and HARDIMAN, Circuit Judges.

SUR PETITION FOR *EN BANC* REHEARING

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

By the Court,

/s/ Thomas L. Ambro
Circuit Judge
December 10, 2009

Appendix C

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF PENNSYLVANIA

No. 07-CR-528

UNITED STATES of America,
Plaintiff,

v.

Carol Anne BOND,
Defendant.

November 19, 2009

MOTIONS HEARING

BEFORE THE HONORABLE JAMES T. GILES
UNITED STATES DISTRICT COURT JUDGE

CERTIFIED TRANSCRIPTION
I DO HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT OF THE ELECTRONIC-SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER

/s/
Gail Drummond
June 20, 2008

Transcribed by: Drummond Transcription Service
Haddon Heights, NJ 08035

Proceedings recorded by electronic sound recording, transcript produced by computer-aided transcription service.

(at 10:44 a.m. in Courtroom 17A.)

DEPUTY CLERK: All rise.

The Honorable Judge James T. Giles presiding. Court is now in session.

THE COURT: Good morning.

MS. KURLAND: Good morning, your Honor.

MR. GOLDMAN: Good morning, your Honor.

THE COURT: Please be seated. Your appearances, please for the record?

MS. KURLAND: Good morning, your Honor. Amy Kurland for the U.S. Attorney's office for the Government.

MR. GOLDMAN: Robert Goldman for the defendant, your Honor, and Eric Reed from my office, also.

THE COURT: Good morning.

(Pause at 10:46 a.m.)

THE COURT: The defendant has a motion to dismiss the indictment — at least certain counts, Counts 1 and 2 — and alternatively to suppress the evidence that was seized from the car and from the home. You may speak on it.

* * *

THE COURT: The motion to dismiss is denied.

The motion to suppress the statement of Ms. Bond is also denied.

The statute which is challenged was enacted by Congress and signed by the President under the necessary and proper clause of the Constitution. It's clear that the intention was comply with the provisions of a treaty.

The treaty -- well, the statute and the treaty -- read almost identically and it covers the requirement upon a treaty member to enact a law through a constitutional process that would punish any person who uses a chemical weapon as it is intended by the treaty to be broadly interpreted for non-peaceful purposes, for any purpose that is not within the exemption or exemptions. The exemptions cover all of the legitimate peaceful purposes that a state or a treaty member could -- could have.

The commerce clause is not implicated because of the necessary and proper clause.

(Pause at 12:26 p.m.)

THE COURT: One could make an argument, of course, that there is a federal interest beyond the interest enumerated by Congress, but this court is bound to look only at the reasons for the enactment of the statute by Congress. Congress does not purport to enact the statute pursuant to the commerce clause.

The -- the statute is not vague, it is clear that if anybody uses a toxic chemical for other than peaceful purposes, the person can be prosecuted.

One doesn't have to know all the kinds of chemicals, one need only have to know that it is a chemical that could do harm to another person's body and use it for purposes of harming or attempting to

harm another person in the way in which that harm is described in the statute.

So, that the -- the plaintiff's -- the defendant's contention -- that the -- she was not on sufficient notice that she could be prosecuted under the statute is without merit.

The statement given by Ms. Bond was given after she was advised of her Miranda rights. It was done pursuant to an arrest warrant, the arrest warrant was executed before any search was completed or commenced, certainly, before Ms. Bond saw any search of her residence.

There is no evidence that she was asked any questions in the course of the arrest in her home. And there is no evidence that anything was done in her home pursuant to the arrest warrant, other than giving her an opportunity to change her clothes, consistent with the weather conditions and her having to leave the home and her being escorted out of the premises to the--the postal inspector's vehicle.

Handcuffs were not put on her -- the Court finds -- until she was about to enter the vehicle. She was not handcuffed in the house. She was not handcuffed on the way to the car, but at the car.

There is no evidence that the plaintiff (sic) did anything, except keep her head down, once she left the house, consistent with her not wanting to be seen or to see anything.

(Pause at 12:31 p.m.)

THE COURT: I find that the statement given pursuant to after her Miranda rights, was given

knowingly and voluntarily according to her own statement.

Is there anything else?

MR. GOLDMAN: You -- did you not rule on the lawfulness of the search warrants, unless you wanted to take a look at those cases I cited.

THE COURT: Thank you.

I -- I find that the search warrants were properly issued.

The affidavits attached -- the affidavit -- attached to each search warrant, one for the car and one for the house of the plaintiff shows that the postal inspector was employed as a postal inspector for six years, that he was assigned to the Dangerous Mail Investigation Team, that his duties included investigation of suspicious mail containing dangerous powers, liquids, explosives, narcotics and other non-mailable substances discovered while in the mail system of the United States for private companies or postal customers residences.

The affidavit is detailed with respect to the control of the investigation, the investigation's direction by the affiant.

There's recitation about how the postal inspectors came to suspect Ms. Bond. There's information about -- detailed information about how Ms. Bond was known to a Ms. Haynes and to Clifford A. Bond. And Paragraph 4, for example, is not attacked in any way by the defendant.

There is also in the affidavit, detailed information pursuant to the investigation of the images resulting from the installation of a camera at the Haynes'

home covering her home, her mailbox, door handle and car.

There is information about where the plaintiff -- the defendant -- had worked, how long she'd worked there, what her duties were, where the chemicals or the potassium dichromate was located in Rohm & Haas.

(Pause at 12:35 p.m.)

THE COURT: And Paragraph 16 or -- or 15 and 16 -- recite that the agent had determined that Carol Anne Bond is the owner of the car in question and the home.

It is reasonable that the issuing magistrate under the totality of the thoroughness of the affidavit would have concluded that this reads as I've determined as a result of the investigation that Carol Anne Bond is the owner of the car and that she lives where the address is recited, not only because of the position of the affiant, but because of the--the obviousness of the identification of the vehicle and the place where she lives. The investigation of Rohm & Haas--through Rohm & Hass -- certainly would have determined where she lived.

Investigation of -- with respect to -- where her husband lived would have shown where she lived and as the investigation relative to Ms. Haynes would have shown where she lived. And there is no dispute that she, in fact, lived where she is -- where she was claimed to have been determined to have lived or that she was the owner of the vehicle. It would have been reasonable, expectable that investigation would have shown the ownership of the vehicle.

The large amount of chemicals alleged to have been taken by the defendant gave the postal inspector probable cause to believe that the unaccounted for chemicals would be found at a place where Carol Anne Bond lived, worked or controlled. She controlled the vehicle that she owned and she had the ability to control spaces where she -- where she lived.

The amount of the potassium dichromate associated with what was ascertained to have been the weight of what was deposited on the mailbox and on the car was far less than the four pounds of potassium dichromate missing from Rohm & Haas, leading to the probable cause conclusion that a substantial amount of potassium dichromate would probably be found in her vehicle or where she lived.

So, the judicial officer who approved the search warrants having considered the totality of the search warrants, would have reasonably and constitutionally approved a warrant for -- a search warrant -- for 1963 Ryan's Run, Lansdale, Pennsylvania, which is described in the warrant and the vehicle which is described in the application and the affidavit for the warrant--for the search warrant.

I think the -- there is a -- a description --

(Pause at 12:40 p.m.)

THE COURT: -- of the house in the application and the affidavit for the search warrant.

The defendant argues that there was an obligation to identify all of the particulars of the investigation for the statement of determination of where the plaintiff lived or how she came to -- how it was that she was the owner of the Saturn.

I find the content of the affidavits -- the contents -- reasonably show that there was determination through the ordinary processes of investigation, the investigation that was described in the affidavits.

Anything else?

MS. KURLAND: Not from the Government, your Honor.

THE COURT: All right.

Do we have a trial date?

MR. GOLDMAN: December 10th.

For the Court's benefit, it's never been the contention of Ms. Bond to fight this case on the facts. I felt it was an obligation on my part with -- given the -- I thought -- unique constitutional issues dealing with the chemical weapons statute to raise these issues for the Court's consideration.

And, in fact, we were prepared to go to the state authorities and plead guilty to the -- to the facts of this case.

I'm saying this to you because what I'm covering with -- and we've started discussing this before with Ms. Kurland was -- that this either be a -- Zudic plea, reserving the right, perhaps, to raise the issues raised today to the appellate court, should we decide that important to do.

And the reason -- so the Court knows -- there's a dichotomy here between decisions which I felt that I needed to do as counsel for Mrs. Bond versus her acceptance of the facts of this case.

THE COURT: I understand that.

MR. GOLDMAN: And -- and given particularly because the sentencing guidelines since they focus on the real intent of the statute, I would -- is eight years in jail.

And I did some looking at the guidelines -- you could assault Senator Spector in the parking lot, you know, with a baseball bat and the guidelines are less than Ms. Bond faces. So --

THE COURT: I don't know if you would -- that that's a proper analogy.

MR. GOLDMAN: Well, I know, I've -- but that shows you how -- how -- in my mind -- where the Government really intended the statute to focus on, but --

THE COURT: Well, I don't know what the sentencing guidelines provide, that's not my issue, either we're going to have a trial date or --

MR. GOLDMAN: We're going to resolve --

THE COURT: -- we're not.

MR. GOLDMAN: -- this case, your Honor. I'm trying to -- I need to find out from the Government whether or not they will take a Zudic plea.

If they won't take a Zudic, then what this would be is a five-minute stipulated fact waiver trial to the Court, which in essence, is a guilty plea just preserving those legal issues.

So, we could set this for a date certain and it should take no longer than a typical guilty plea, one way or the other, I need to find out from Ms. Kurland, if the Government will accept.

THE COURT: The 10th is a Monday.

Then, how about December 6th which is a Thursday?

MR. GOLDMAN: May I check my calendar, your Honor?

(Pause at 12:44 p.m.)

MS. KURLAND: Your Honor, I don't have my calendar with me, I assume that that date is good, but if --

THE COURT: Well, you can check when you get back --

MS. KURLAND: Very good.

THE COURT: -- on -- on December 6th and a time. I haven't looked at my calendar either, but we'll set that for in a proffer of a guilty plea. Because if a jury has to be called in for this case, it will have to be done on Thursday afternoon and Friday.

So, to avoid calling in a jury when a jury doesn't have to be called in, we'll do it on the 6th, if we can or the 5th.

I'm not superstitious about Friday the 7th, but that's Pearl Harbor Day.

(Pause at 12:45 p.m.)

(Discussion held off the record.)

THE COURT: There being nothing else, we stand adjourned. The defendant remains in custody.

MR. GOLDMAN: Thank you, your Honor.

MS. KURLAND: Thank you, your Honor.

(Adjourned in this matter at 12:46 p.m.)

Appendix D

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 07- 528

UNITED STATES of America,
Plaintiff.

v.

Carol Anne BOND,
Defendant.

Filed Nov. 19, 2007

ORDER

AND NOW, this 19th day of November, 2007, it is hereby ORDERED that Defendant's Motion to Suppress Evidence (Docket No. 24), Defendant's Motion to Dismiss Counts I and II of the Indictment (Docket No. 27), Defendant's Motion to Suppress Statements, and all responses thereto, are DENIED for the reasons stated by the court at the record hearing held this date in the above-captioned matter. The court reserves the right to edit, change, or otherwise elaborate upon the stated reasons, consistent with the rulings announced.

BY THE COURT:

/s/ James T. Giles

JAMES T. GILES J.

Appendix E

CONVENTION ON THE PROHIBITION OF THE DEVELOPMENT, PRODUCTION, STOCKPILING AND USE OF CHEMICAL WEAPONS AND ON THEIR DESTRUCTION

PREAMBLE

The States Parties to this Convention,

Determined to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction,

Desiring to contribute to the realization of the purposes and principles of the Charter of the United Nations,

Recalling that the General Assembly of the United Nations has repeatedly condemned all actions contrary to the principles and objectives of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925 (the Geneva Protocol of 1925),

Recognizing that this Convention reaffirms principles and objectives of and obligations assumed under the Geneva Protocol of 1925, and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction signed at London, Moscow and Washington on 10 April 1972,

Bearing in mind the objective contained in Article IX of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction,

Determined for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons, through the implementation of the provisions of this Convention, thereby complementing the obligations assumed under the Geneva Protocol of 1925,

Recognizing the prohibition, embodied in the pertinent agreements and relevant principles of international law, of the use of herbicides as a method of warfare,

Considering that achievements in the field of chemistry should be used exclusively for the benefit of mankind,

Desiring to promote free trade in chemicals as well as international cooperation and exchange of scientific and technical information in the field of chemical activities for purposes not prohibited under this Convention in order to enhance the economic and technological development of all States Parties,

Convinced that the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons, and their destruction, represent a necessary step towards the achievement of these common objectives,

Have agreed as follows:

ARTICLE I

General Obligations

1. Each State Party to this Convention undertakes never under any circumstances:

   (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;

   (b) To use chemical weapons;

   (c) To engage in any military preparations to use chemical weapons;

   (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

2. Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.

3. Each State Party undertakes to destroy all chemical weapons it abandoned on the territory of another State Party, in accordance with the provisions of this Convention.

4. Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.

5. Each State Party undertakes not to use riot control agents as a method of warfare.

ARTICLE VII

National Implementation Measures

GENERAL UNDERTAKINGS

1. Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall:

   (a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;

   (b) Not permit in any place under its control any activity prohibited to a State Party under this Convention; and

   (c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

2. Each State Party shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1.

3. Each State Party, during the implementation of its obligations under this Convention, shall

assign the highest priority to ensuring the safety of people and to protecting the environment, and shall cooperate as appropriate with other States Parties in this regard.

RELATIONS BETWEEN THE STATE PARTY AND THE ORGANIZATION

4. In order to fulfill its obligations under this Convention, each State Party shall designate or establish a National Authority to serve as the national focal point for effective liaison with the Organization and other States Parties. Each State Party shall notify the Organization of its National Authority at the time that this Convention enters into force for it.

5. Each State Party shall inform the Organization of the legislative and administrative measures taken to implement this Convention.

6. Each State Party shall treat as confidential and afford special handling to information and data that it receives in confidence from the Organization in connection with the implementation of this Convention.

   It shall treat such information and data exclusively in connection with its rights and obligations under this Convention and in accordance with the provisions set forth in the Confidentiality Annex.

7. Each State Party undertakes to cooperate with the Organization in the exercise of all its

functions and in particular to provide assistance to the Technical Secretariat.

Appendix F

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
	)	PRESENTENCE
v.	)	INVESTIGATION
	)	REPORT
	)	
CAROL ANNE BOND		No. 07-00528-01

Prepared For: THE HON. JAMES T. GILES
U.S. District Court Judge

Prepared By: Alexander T. Posey
Senior U.S. Probation Officer
610 320 5166

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Philadelphia, PA 19106
215-861-8325

Defense Counsel
Robert E. Goldman
Fox Rothschild, LLP
2700 Kelly Rd. Ste. 300
Warrington, PA 18976
215-918-3550
Designation: Retained

Sentence Date: June 3, 2008

Offense: Counts One and Two:
Using a chemical weapon
18 U.S.C. § 229(a) - Up to life imprisonment/$250,000 fine, Class A felonies

	Counts Three and Four: Theft of mail 18 U.S.C. § 1708 - Five years / $250,000 fine, Class D felonies
Arrest Date:	June 8, 2007, by the U.S. Postal Inspectors Service, Philadelphia, Pennsylvania
Release Status:	The defendant is in federal custody.
Detainers:	None.
Codefendants:	None.
Related Cases:	None.
Date Report Prepared:	February 5, 2008
Date Report Revised:	May 16, 2008
Identifying Data:	
Birth Name:	Carol Anne Atwell
Date of Birth:	December 6, 1970
Age:	37
Race:	Black, Non-Hispanic
Sex:	Female
SSN No:	183-74-8299
FBI No:	732221RC2
USM No:	61301-066
Other ID No:	A026111070 [Alien Registration No.]
PACTS No:	029597

Education:	Two masters degrees
Dependents:	None
Citizenship:	Naturalized U.S. citizen
Legal Address:	1963 Ryans Run, Lansdale, PA 19446
Current Address:	Federal Detention Center P.O. Box 562 Philadelphia, PA 19105
Aliases:	Carol Bond (surname by marriage) Carol Anne Bond (as indicated) Carol Anne Atwell (maiden name) "Betty" Bond (nickname) Carolanne L. Bond (as it appears on credit report) Carol-Anne L. Bond (as it appears on police reports)

* * *

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. Carol Anne Bond was named in a four-count Indictment returned by a federal grand jury sitting in the Eastern District of Pennsylvania on September 5, 2007. The Indictment charged Bond with two counts of using a chemical weapon, in violation of 18 U.S.C. § 229(a) **[COUNTS ONE**

and TWO], and theft of mail, in violation of 18 U.S.C. § 1708 **[COUNTS THREE and FOUR]**.

2. Pursuant to Federal Rule of Criminal Procedure 11, the parties have entered into a written plea agreement that contains certain provisions and stipulations. On December 5, 2007, in accordance with that written plea agreement, Carol Anne Bond appears in U.S. District Court for the Eastern District of Pennsylvania before the Honorable James T. Giles and entered a guilty plea to Counts One, Two, Three and Four of the Indictment, arising from the defendant's use of toxic chemicals against another individual and her theft of mail from that same individual.

3. The instant offense occurred in or about November 2006 and June 7, 2007; therefore, both the Sentencing Reform Act of 1984 and the Antiterrorism and Effective Death Penalty Act of 1996 apply. The edition of the Sentencing Guidelines Manual used to calculate the guidelines in the report is that incorporating amendments effective May 1, 2008, as there are no ex post facto concerns.

Plea Agreement Information

4. The terms of the written plea agreement are summarized as follows:

    a. The defendant agrees to pay the special victims/witness assessment in the amount of $400 at such time as directed by the Court.

5. The U.S. Attorney's Office and the defendant have agreed to the following stipulations under the Sentencing Guidelines Manual effective

November 1, 2007. Pursuant to U.S.S.G. § 6B1.4, these stipulations are not binding upon this Court:

a. As of the date of this agreement, the defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for the offense charged. Therefore, a downward adjustment of two levels for acceptance of responsibility is appropriate if the defendant's acceptance of responsibility continues through the date of sentencing. (U.S.S.G. § 3E1(a))

b. As of the date of this agreement, the defendant has timely notified authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently. Therefore, a downward adjustment of one additional level is appropriate. (U.S.S.G. § 3E1.1(b)(2))

6. The parties agree under Rule 11(a)(2) that in entering this agreement, the defendant reserves the right to appeal the Court's ruling on the defendant's pre-trial motion to dismiss the indictment and the defendant's pre-trial motion to suppress evidence.

Pretrial Adjustment

7. The defendant is detained and has not been under the supervision of the U.S. Pretrial Services Office.

Status of Codefendants

8. There are no codefendants in this case.

Related Cases

9. There are no related cases.

The Offense Conduct

Factual Background

10. On March 5, 2007, the U.S. Postal Inspection Service received a complaint from Myrlinda Haynes, a resident of 24 Zummo Way, Norristown, Pennsylvania. Ms. Haynes told the inspectors that someone was placing chemicals into her mailbox, on her mail, on her front door, and on her vehicle's doors. Ms. Haynes suspected Carol Anne Bond, because Bond is married to Clifford A. Bond who is the father of Ms. Haynes' two-year old child through an extra marital affair. According to Ms. Haynes, approximately two years ago, Carol Anne Bond phoned Haynes and stated something to the effect of "I going to make your life a living hell," and "dead people will visit you." Thereafter, Ms. Haynes reported receiving harassing letters and phone calls.

11. The Norristown Police Department received multiple reports from Ms. Haynes that she was being harassed by Bond. It is noted that Bond was convicted on a charge of harassment against Ms. Haynes in Magisterial District Court 38-1-16 in Montgomery County, Pennsylvania, in 2005. Ms. Haynes stated that the first incident involved chemicals being placed on her vehicle was during

the Thanksgiving holiday of 2006.[1] The second incident involving chemicals occurred during the weekend of February 24, 2007. Ms. Haynes photographed the red powdery substance. She also documented every time she noticed any form of chemicals on her front door, mailbox, and vehicle.

12. On March 14, 2007, U.S. Postal inspectors went to Ms. Haynes' residence to screen the chemical. They also installed a video camera at Ms. Haynes home, positioned to view the outside of her home, including her mailbox, door handle and car. On April 12, 2007, at approximately 7:30 a.m., the video camera captured an African American female stealing mail from Ms. Haynes' mailbox. The mailbox is mounted on the outside brick wall. The female was observed opening the mailbox, retrieving mail from inside, examining the mail, and removing a business size envelope. The female then left the vicinity with the envelope. This theft of mail is the basis for Count Four of the Indictment.

13. On May 23, 2007, at approximately 10:28 p.m., the video camera installed at Ms. Haynes' home again captured the same female placing a red powdery substance on the inside of Ms. Haynes' car muffler, which was parked on a marked

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[1] It is noted that the Norristown Police Department received a complaint from Ms. Haynes on November 12, 2005, regarding an unidentified substance upon the driver-side front windshield, the driver-side door window, and the driver-side door handle.

parking spot #24 on Zummo way. The female is observed going back and forth several times between her own car and Haynes' car. The red powdery substance is visible on the ground underneath the vehicle's muffler and inside of the muffler's tail pipe.

14. Ms. Haynes reviewed the videotape of May 23, 2007, and a photo-spread that contained a photograph of Carol Anne Bond. She identified Bond as the person who placed the chemical substance in her vehicle's muffler. Ms. Haynes also reviewed the videotape of April 12, 2007, and again recognized Bond as the female who stole her mail from her mailbox. Bond had worked at Rohm and Haas at the Spring House Technical Center from December 11, 2000 to November 2, 2006. During those six years, Bond was employed as a level 5 technical assistant in the CIS / Biocides organization. Bond's responsibilities included microbiological challenge testing on plastics samples and some routine analytical work including, high pressure liquid chromatography (HPLC), at the time of her resignation.

15. During the time Bond worked in Spring House building, there was an inventory entry for five pounds of potassium dichromate in building 4B for Dr. Broughton. According to Dr. Broughton, only one pound of potassium dichromate was left from the original five pounds, and the Potassium dichromate was stored at the "common storage locker area" to which Carol Anne Bond had access. Dr. Broughton stated that he used a very small amount of the original five pounds of

potassium dichromate, an amount far from the weigh of the four pounds that is currently missing. Bond did not have authorization to remove any chemicals from Rohm and Haas.

16. According to Rohm and Haas Lab Director Dr. David Greenley - Chemical Engineer, potassium dichromate is highly toxic and, if ingested, may cause death. On June 8, 2007, agents with the U.S. Postal Inspection Service arrested Bond and executed search warrants on her house and her car. Agents discovered a piece of stolen mail in Bond's house, with a postmark of February 26, 2007, and an additional tube of chemical in her car. The piece of stolen mail is the basis for Count Three of the indictment.

17. Bond admitted that she took the chemicals from Rohm and Haas when she had been employed there.[2]

The Chemicals

18. Two separate chemicals were analyzed. The first chemical was a red powdery substance which was found on the door handle and in the muffler of Ms. Haynes' car, and on the mailbox and the front door handle of Ms. Haynes' residence.[3] The

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[2] It is noted that the defendant contends that she was not responsible for all four pounds of potassium dichromate missing from Rohn and Haas. Instead, she reportedly acquired potassium dichromate from an internet website. This is the only fact of the case contested by the defendant.

[3] The red powder was also found spilled on the ground below the muffler of Ms. Haynes' vehicle. In addition, a black fabric

(Continued...)

second chemical was a white substance that was also found on the door handles of Ms. Haynes' residence and car. Additionally, a tube containing the same white substance found in Bond's car.

19. The red powdery substance was sent to the laboratory for examination. Robert Moberley, Senior Forensic Chemist, U.S. Postal Inspection Service, Forensic Laboratory Service, determined that it was potassium dichromate, which is a strong oxidizer and extremely destructive to tissues of the mucous membranes and upper respiratory tract. Potassium dichromate may also cause ulceration and perforation of the nasal septum, may produce pulmonary sensitization or allergic asthma, and higher exposures may cause pulmonary edema. If potassium dichromate is ingested is may cause severe burns of the mouth, throat and stomach, leading to death. Any skin contact may cause redness, pain, and severe burn, and if exposed to broken skin it may cause ulcers (chrome sores) and absorption, which may cause systemic poisoning, affecting kidney and liver functions. Potassium dichromate is highly toxic and if absorbed through the skin may cause death. The weight count for the potassium dichromate sent to the lab on this case was approximately 28 grams. The remaining amount of potassium dichromate, that is approximately four pounds, is still missing. The use of the toxic

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cloth filled with the red powder had been stuffed into the muffler of the vehicle.

chemical potassium dichromate as a weapon is the basis for Count One of the Indictment.

20. The white powdery substance was sent to the Pennsylvania State Police laboratory, Bureau of Forensic Services. Forensic Scientist Susan Atwood determined that the white powder contained arsenic, a toxic chemical. The white powder was a specialty chemical called 10-cholo-10Hphenoxarsine. It is a precursor material used to prepare a commercial biocide product and is toxic. Absorption through the skin may be fatal. This material is not available to the general public. Dr. David Greenley looked into the history of the chloro-phenoxarsine materials as it a specialty chemical and traceable, almost like a fingerprint. Dr. Greenley traced the sample back to the Morton Company, located in North Andover, Massachusetts, in 1997. Rohm and Haas acquired Morton in 1999. The chemist responsible for the chemical possessed it for almost ten years and brought it with him when Rohm and Haas relocated him for employment from Massachusetts to Spring House, Pennsylvania. The use of the toxic chemical 10-cholo-10Hphenoxarsine as a weapon is the basis for Count Two of the Indictment.

21. It is noted that a third, non-toxic chemical, identified as glycacil, was recovered from Bond's 2007 Saturn Ion during a search of the vehicle following the defendant's arrest. The glycacil was also determined to have been taken from Rohm and Haas. The glycacil was found in the glove compartment on the vehicle package in a glass container commonly found at Rohm and Haas's

Spring House laboratory. It is noted that small particles of potassium dichromate were also located in the glove compartment, center console, and on the floor behind the driver's seat of Bond's vehicle.

Victim Impact

22. The Antiterrorism and Effective Death Penalty Act of 1996, including the Mandatory Victims Restitution Act of 1996, applies to this case and restitution is required.

23. Ms. Myrlinda Haynes, her child, and Rohm and Haas are identified as the victims in the instant offense. Rohm and Haas suffered some financial loss associated with the stolen chemicals. However, Dennis O. Wilson, on behalf of Rohm and Haas, advised the probation officer in a letter, dated March 3, 2008, that "Rohm Haas appreciates the opportunity to seek restitution in this matter" but has "determined not to do so." Therefore, Rohm Haas has declined "to provide a declaration of victim losses or a victim impact statement."

24. Ms. Haynes informed U.S. Postal Inspectors that she was burned once by the chemicals planted on her front door. She experienced a burning sensation on her thumb which required repeated rinsing with water to subside. This is the only instance where one was injured by the chemicals. However, it is not only the damage inflicted upon Ms. Haynes. Ms. Haynes sold her home in Norristown, Pennsylvania, and moved to a new location due to the fear she continued to experience in her home. The Victim/Witness Services for the U.S. Attorney's Office assisted

Ms. Haynes with some of the financial cost associated with her move. It is noted that Ms. Haynes is expected to address the Court at the time of sentencing.

25. The probation officer interviewed Ms. Haynes on February 20, 2008. Ms. Haynes related the frustration she experienced in having anyone take her seriously about the chemicals she found repeatedly on her car. She struggles with paranoia, not just for herself, but also for her daughter, fearful that the events of the instant offense will resurface and she will be hurt. She wishes to be the person she once was and pursue counseling. However, she has found the cost prohibitive. Meanwhile, friends have lent her emotional and family support. Ms. Haynes also furnished this officer with an affidavit of losses. She estimated that her out-of-pocket expenses are at least $17,030.97. Ms. Haynes' expenses included at least twenty one car washes, valued at $12.99 per wash, and a full interior and exterior cleaning, valued at $179.00, after receiving her vehicle back from the U.S. Postal Inspection Service in order to remove all chemicals from the car. Ms. Haynes also had her daughter tested for any contamination, resulting in $345.00 in medical related expenses. She informed that her daughter suffered no ill effects from the instant offense. Ms. Haynes also moved from the home in which she had been living. She did not profit from the sale of her home. Instead, she incurred other expenses, exceeding $16,000, from the home's sale and her subsequent move to a new residence. Ms. Haynes' wrote the following

statement on the affidavit which sums-up her experience:

> "I'm a single, black female who was able to purchase a home on my own. But due to the turmoil and ordeal that Carol Anne Bond put my daughter and I through, I was forced to sell my home of five and a half years. I'm now living in a small apartment, where the rent is much higher than my mortgage was and my utilities are twice the amount they used to be. I'm financially exhausted and therefore, I'm unable to purchase another home for my daughter and myself."

Adjustment for Obstruction of Justice

26. The probation officer has no information suggesting that the defendant impeded or obstructed justice.

Adjustment for Acceptance of Responsibility

27. The defendant, through counsel, conveyed her agreement with the factual basis for the guilty plea with the exception that she was responsible for the theft from Rohm and Haas of the additional four pounds of potassium dichromate that remains missing. The defendant admitted that she stole Ms. Haynes' mail and laced Ms. Haynes' front door and car with chemicals. The defendant then provided a historical background of her relationship with Ms. Haynes.

28. The defendant described Ms. Haynes as a family friend who became like a sister to her and her family. They spent a great deal of time together, vacationing, shopping, and at holiday

celebrations. During the time of their friendship, the defendant married her husband, Clifford Bond. The defendant's husband and Ms. Haynes also developed a friendship. However, the defendant was bothered at the nature of their relationship, noting that they had grown too close together by 2000. The defendant mentioned that her husband was more sensitive than her with Ms. Haynes, and that he was better suited to talk with Ms. Haynes about her problems, struggles, etc. The defendant wanted them separated for fear it would lead to a more intimate relationship.

29. The relationship between the defendant's husband and Ms. Haynes soured her friendship with Ms. Haynes. However, they continued to be friends. The defendant said she was overjoyed for Ms. Haynes upon learning that she had become pregnant. The defendant noted that Ms. Haynes had endured miscarriages before. The defendant even noted said she had been helping Ms. Haynes prepare for her to have her first child before learning that her husband was the father. The defendant was told of the affair by her husband. Even so, the defendant already suspected it based upon an earlier conversation with her sister. The defendant found the news very difficult to accept, but she did not directly confront Ms. Haynes about it. The defendant contends that she did not have intent to bring about Ms. Haynes' death.

30. The defendant was interviewed by the U.S. Postal Inspector on June 7, 2007, at the time of her arrest. The U.S. Postal Inspector noted that the defendant seemed more concerned with her career and her future move to California than

answering questions posed to her regarding the instant offense. The U.S. Postal Inspector queried the defendant about the whereabouts of any of the remaining chemicals, namely the missing pounds of potassium dichromate. The defendant could not articulate precisely where the potassium dichromate was disposed but said it had been disposed of properly where no one would be harmed. The U.S. Postal Inspector also queried the defendant if her actions in the instant offense were intended to bring harm to or kill Ms. Haynes' child. The defendant said she believed the red powder was an irritant that would cause a rash or irritate the skin. She did not address the U.S. Postal Inspector's questions about harming or killing Ms. Haynes' child.

31. The defendant's agreement with the facts of the case, notwithstanding her contention that she took the additional four pounds of potassium dichromate, and her statement to the probation officer about why she concocted this plan meets the minimal requirements for acceptance of responsibility. The offense level will be reduced two levels, pursuant to U.S.S.G. § 3E1.1(a). The additional one-level reduction to the offense level, pursuant to U.S.S.G. §3E1.1(b), is also applicable as per the parties stipulation.

Offense Level Computation

32. The May 1, 2008, edition of the Guidelines Manual has been used in this case due to no ex post facto concerns.

Counts One and Two - Using a chemical weapon

Counts Three and Four - Theft of mail

33. The defendant's theft of mail, as charged in Counts Three and Four, may or may not have been related to the defendant's use of a chemical weapon, as charged in Counts One and Two. For one reason or another, the defendant stole Ms. Haynes' mail on at least two occasions. In any case, Counts Three and Four are grouped as closely related counts, pursuant to U.S.S.G. §3D1.2(d), as both offenses are covered by U.S.S.G. §2B1.1.

34. Counts One and Two are grouped as closely related counts, pursuant to U.S.S.G. §3D1.2(b), as both counts involved Ms. Haynes as the victim, and the defendant used a chemical weapon on multiple occasions between November 2006 and June 7, 2007, as a means of carrying out her criminal objection, bringing harm to Ms. Haynes.

35. The group with Counts One and Two and the group with Counts Three and Four are further grouped, pursuant to U.S.S.G. §3D1.2(b). The determination of the offense level, and ultimately the guideline range of imprisonment, is no different than if the guideline calculations were completed for each group collectively or separately. For simplicity, all of the counts were grouped together despite a question as to how theft of the mail related to using a chemical weapon. Counts One and Two are the most serious counts of the group. Pursuant to U.S.S.G. § 3D1.3(a), the offense level is determined for the count in the group resulting in the highest offense level.

36. **Base Offense Level:** The United States Sentencing Commission Guideline for violation of 18 U.S.C. § 229(a) is found in U.S.S.G. §2M6.1 and calls for a base offense level of 28 under subsection (a)(2). 28

37. **Specific Offense Characteristic:** The offense involved the use of a toxic chemical. However, it was not a toxic chemical found in Schedule I of the Annex of Chemicals to the Chemical Weapon Convention (Application Note 1 in U.S.S.G. § 2M6.1). Therefore, the upward adjustment to the offense level, pursuant to U.S.S.G. § 2M6.1(b)(1), is not applicable. 0

38. **Specific Offense Characteristic:** It is possible that the offense was tantamount to attempted murder. The defendant purposely placed the toxic chemicals potassium dichromate and 10-cholo-10Hphenoxarsine on the handles of her car and front door, places where Ms. Haynes would place her hand and expose her to the toxins. Pursuant to U.S.S.G. § 2M6.1(c)(2), the guideline for U.S.S.G. § 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder) should be applied if the resulting offense level is greater than that determine above. In this case, an argument could be made that the base offense level could be 33 under U.S.S.G. §2A1.2(a) if the object of the offense would have constituted first degree murder. It appears that the defendant purposefully placed the toxic chemicals in places where Ms. Haynes would expose herself to it. The defendant contends that she did not

wish to murder Ms. Haynes as a means of retribution. The government's evidence does not contradict this statement. Therefore, it appears that the best approach to determining the offense level is to forego the cross reference to U.S.S.G. § 2A2.1.[4] 0

39. **Victim Related Adjustments:** Ms. Haynes' child could also have been injured or killed in the instant offense should the child had touched, inhaled, or ingested the potassium dichromate or the 10-cholo-10Hphenoxarsine. Ms. Haynes' child could be viewed as a vulnerable victim, pursuant to U.S.S.G. § 3A1.1. However, as the child was not injured in the instant offense, and it is not certain if Ms. Haynes' child was targeted, the probation officer elected not to apply the enhancement.[5] 0

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[4] The defense contends that the "discussion on enhancements that no one suggests are application in this case" is not warranted in the presentence report and objects to this paragraph for its inclusion. The probation officer respectfully disagrees. The inclusion of this "discussion" shows the Court that the probation officer did consider the particular adjustment, be it upward or downward, but rejected it. The Court should be aware of whether or not meaningful thought was made in the completion of the presentence report.

[5] For the same aforementioned reasons cited in Footnote 4, the defense objects to the discussion of a victim-related adjustment in paragraph 39. Again, the probation officer respectfully disagrees. The inclusion of this "discussion" shows the Court that the probation officer did consider the particular adjustment but rejected its application.

40. **Adjustments for Role in the Offense:** The defendant was employed at Rohn and Haas prior to the time frame of the instant offense. The defendant has access to the toxic chemicals used in the instant offense during the time of her employment at Rohm and Haas. Furthermore, the defendant has admitted that she took chemicals from Rohm and Haas when she had been employed there as a level 5 technical assistant in the CIS / Biocides organization. It is noted that the defendant's responsibilities included microbiological challenge testing on plastics samples and some routine analytical work including, high pressure liquid chromatography (HPLC), at the time of her resignation. Due to her work at Rohm and Haas, she had routine, unfettered, access to the toxic chemicals (i.e., the chemical weapon) she later utilized against Ms. Haynes. The removal of the chemicals was difficult to detect as no record was kept at Rohm and Haas was kept to sign-out the chemicals. The defendant also possessed a sufficient degree of authority with a reliance of integrity as it was routine for her to access and use the chemicals. It also demonstrates her use of special skill as a trained microbiologist. The defendant understood the effect the chemical could have a person. The average individual, including the victim, does not understand the possible effects that certain chemicals could have on a human being. Pursuant to U.S.S.G. § 3B1.3, two levels are added for the defendant's abuse

of her position of trust and use of a special skill. +2

41. **Adjustment for Obstruction of Justice:** None. 0

42. **Adjusted Offense Level (Subtotal)** 30

43. **Adjustment for Acceptance of Responsibility:** Pursuant to U.S.S.G. § 3E1.1(a), the offense level is reduced by two. -2

44. **Additional Adjustment for Acceptance of Responsibility:** Pursuant to U.S.S.G. § 3E1.1(b), the offense level is reduced by one additional level. -1

45. **Adjusted Offense Level:** 27

46. **Chapter Four Enhancements:** None. 0

47. **Total Offense Level:** **27**

PART B. DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudication(s)

48. The defendant was a resident of Barbados until the age of 25. Therefore, any juvenile history in the defendant's native country could not be verified.

Adult Criminal Conviction(s)

49. NOTE: Pennsylvania State Law, adopted November 29, 1972, requires the assignment or knowing waiver of counsel for all indigent defendants.

50.

Date of Arrest	Conviction/ Court	Date Sentence Imposed/ Disposition	Guide-lines	Pnt
09/05/2005 (Age: 34)	Count One: Harassment/ Magistrate District Court 38-1-16, Montgomery County, Pennsylvania, Docket No. NT-1206-05 and Court of Common Pleas, Criminal Division for Montgomery County, Pennsylvania, Docket No. CP-46-SA-3137-2005	11/02/2005: Found guilty after trial, sentence to pay a $100 fine and court costs. 12/09/2005: Summary appeal filed with the Court of Common Pleas, Criminal Division for Montgomery County, Pennsylvania. Assigned Docket No. CP-46-SA-3137-2005. 02/08/2008: Summary appeal trial held, found guilty upon withdrawal of summary appeal. Sentenced to pay a $100 fine and court costs.	§ 4A1. 1(c)	+1

51. The citation states that the defendant continually harasses the victim, Myrlinda Haynes, with phone calls and letters, annoying the victim. A supplemental report completed by the Norristown Police Department notes that Ms. Haynes had come to the police station to file the complaint against the defendant. She showed the Norristown Police Department the letters and pictures she received. The pictures depicted Ms. Haynes' face cut by some type of straight edge. Ms. Haynes also noted that her co-worker at her place of employment received a phone call from someone who claimed to be the defendant's cousin. The person made disparaging remarks about Ms. Haynes in an attempt to have her fired. Lastly, Ms. Haynes produced a Bible she received which had been marked in different areas in attempt to make her feel guilty about her affair with the defendant's husband.

Criminal History Computation

52. The total of the criminal history points is one. According to the sentencing table at U.S.S.G. Chapter 5, Part A, one criminal history point establishes a criminal history category of I.

Other Criminal Conduct

53. None.

Pending Charges

54. None.

Other Arrests

55. None.

PART C. OFFENDER CHARACTERISTICS

Personal and Family Data

56. The defendant was born Carol Anne Atwell on December 12, 1970, in Bridgetown, Barbados. She is the only child born to the paramour union of Sandra (nee Bryan) and Anthony Atwell. The defendant believes that her parents married when she was approximately six years old but had co-habitated beforehand. The defendant was reared by both parents until the age of eleven. The defendant's parents then divorced. Afterwards, the defendant continued to live with her mother and half-sister Sonya.

57. The defendant said her father continued to have regular contact with the family until she was seventeen years old. He then relocated to the United States. The defendant last saw her father approximately 15 years ago. She has heard that he remarried and fathered additional children, but this is not verified. The defendant does not know his present whereabouts. The defendant's mother is now in her mid-fifties. She lives in the United States with her daughter, Sonya, and is employed as a certified nursing assistant at the Phoenixville Hospital. Sonya (nee Bryan) Forde, is 40 years old and lives at 133 Fairview Avenue, Trooper, Pennsylvania, with her husband. Sonya and the defendant have the same mother. The defendant enjoys a good relationship with both her mother and her sister.

58. The defendant remained in Barbados until 1995. She then immigrated to the United States, entering via Philadelphia, and shared a residence with Sonya and her husband in the 700 block of

Stafford Street in Philadelphia, Pennsylvania. The defendant lived with Sonya for approximately two years at this address. The defendant was also married during this time frame. On October 25, 1996, she wed Clifford Bond. The defendant noted that she originally met Clifford in Barbados. Clifford is 38 years old and employed as a computer specialist by Rohn and Haas at its 6th and Market Street location in Philadelphia, Pennsylvania. The defendant and Clifford lived with Sonya and her husband for a short period of time after marrying. They later moved into their first home at 618 8th Avenue, Lindenwold, New Jersey, in 1997. The defendant lived at this address for approximately four years.

59. The defendant informed that she and Clifford sold the Lindenwold property in 2001 and moved to 1963 Ryans Run, Lansdale, Pennsylvania. They have lived here for the past six years. The defendant does not have any children with Clifford or any other man. She informed that she is the adoptive parent of her younger brother, Hugh Alexander ("Alex") Grannum. The defendant said she and her husband adopted Hugh six years ago, about the same time they moved to Lansdale, Pennsylvania. Alex has a different father than the defendant and her sister, Sonya. The defendant that her mother was unable to support him. She believed that she and her husband could provide a better life and a better education for him, as well as make it easier for him to become a naturalized U.S. citizen. Alex is now 19 years old and employed as an auto body technician. He continues to live with the

defendant's husband at 1963 Ryans Run, Lansdale, Pennsylvania.

60. The defendant's husband fathered a child named Gabrielle Haynes through a paramour union with Myrlinda Haynes. Gabrielle is now two years old.[6] She lives with her mother in Montgomery County, Pennsylvania. It is noted that the defendant's husband is responsible for paying support to Ms. Haynes via court order. The affair between the defendant's husband and Ms. Haynes severed the relationship she had with Ms. Haynes and has greatly impacted her marriage. The defendant said they did attend three sessions of marital counseling. She could not recall the name of the counseling office. The probation officer later learned and confirmed that the defendant attended these counseling sessions with Louis Baldino, a psychologist in Harleysville, Pennsylvania. The defendant also said they continued to live together and are still legally married. The defendant questioned whether or not the married will survive. Meanwhile, she maintains regular contact with her husband via personal visits and phone calls.

61. The probation officer interviewed the defendant's husband, Clifford Bond, on January 23, 2008.

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[6] During the probation officer's interview of Ms. Haynes on February 20, 2008, she said Clifford Bond pressed her to abort the child. She refused and noted that the defendant actually encouraged her to have the child. Ms. Haynes has no contact with Clifford Bond regarding the welfare of their child. She added that he has shown no interest in knowing his child.

Mr. Bond informed that he was born in New York and raised there until the age of nine. He then moved with his family to Barbados, where he spent the next seventeen years. Mr. Bond met the defendant while in Barbados. They began dating almost twenty years ago. Mr. Bond confirmed the date and place of his marriage to the defendant and that they have lived in the United States since the mid-1990s.

62. Mr. Bond was visibly upset discussing the instant offense, oftentimes casting blame upon himself for the defendant's actions. He acknowledged his love for the defendant and repeatedly referred to the shame he felt for the pain he caused the defendant over the affair with Ms. Haynes. Mr. Bond described Ms. Haynes in similar terms as the defendant, noting that she was like a sister to the defendant's family. He, too, no longer speaks with Ms. Haynes. Mr. Bond stated that he made a decision to forego any further relationship with Ms. Haynes in order to salvage his marriage with the defendant. Ms. Haynes did not take lightly to his decision. He currently is not permitted to have any contact with their daughter, Gabrielle. However, he is court-ordered to pay child support.[7] Mr. Bond noted that he and the defendant discussed divorcing, but instead

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[7] Ms. Haynes statements regarding her relationship with Clifford Bond did not coincide with his statements regarding their relationship or any relationship Mr. Bond could have regarding their child. It should suffice to say that any contact between Ms. Haynes and Mr. Bond regarding the child is conducted through legal representation.

committed themselves to working through the infidelity.

63. Mr. Bond spoke very fondly of the defendant. He described her as a warm, caring, and loving individual. The person who committed the instant offense is not the woman he has come to know and love over the past twenty years. Mr. Bond regularly visits his wife at the Federal Detention Center and speaks with her via telephone. He also continues to live with the defendant's younger brother Alex. There is no further discussion of divorce. Mr. Bond tearfully stated that he just wants his wife home again.

64. Mr. Bond related that he still enjoys an intact relationship with the defendant's mother and sister. The probation officer interviewed the defendant's sister, Sonya, at her home in Trooper, Pennsylvania, on January 30, 2008. Sonya provided further confirmation of the defendant's background. She also described how greatly distressed she became following her sister's imprisonment in the instant offense. Sonya said that she was so shocked by the arrest that it caused her to suffer a stress-induced heart attack. The instant offense greatly effected Sonya as well. She, too, regarded Mylinda Haynes as a sister. Sonya ended her relationship with Ms. Haynes subsequent to the defendant's arrest. She felt as if she lost two sisters in the past year with all that has transpired.

65. Sonya could not help but emphasize how out-of-character the instant offense was for the defendant to have committed. She could only speculate that her sister was suffering so much

within herself in order to have carried out such these acts against Ms. Haynes. Sonya said she, unlike the defendant, is the more emotional one between them. Sonya felt that the defendant should have gotten counseling earlier. However, she always knew the defendant to be the strong one, the one who kept it all together, and the one who always thought of others before herself. Sonya only wants the defendant to find healing and happiness. She is content to let the outcome in God's hands while praying that the defendant will receive mercy.

66. The probation officer also interviewed the defendant's mother, Sandra Atwell, in person at the Phoenixville Hospital where she is employed. Ms. Atwell provided confirmation of the defendant's background and made observations about her daughter's personality. She described the defendant as a shy, introverted individual who is a great listener and humanitarian. Ms. Atwell knew her daughter to be one who instantly cared for someone, even if she didn't really know them. She knew the defendant was committed to furthering her education, her career, and rebuilding trust in her marriage to Clifford Bond.

67. Ms. Atwell conveyed her shock and disbelief about the defendant's arrest. It is noted that she was unfamiliar with the details of the instant offense, and she does not know what actions the defendant took against Myrlinda Haynes, a woman whom the defendant's mother considered to be her third daughter. Despite all that has transpired, the defendant's mother holds no ill feelings towards Myrlinda or her daughter. She

prayerfully hopes all can forgive one another. Overall, the defendant's mother recapitulate many of the same feelings that Sonya Forde conveyed regarding the defendant. She felt responsible for failing to see through the masquerade maintained by the defendant regarding the pain she experienced over the affair between the defendant's husband and Ms. Haynes. The defendant's mother desperately wishes to see the defendant home with them again.

Physical Condition

68. The defendant is healthy and has no history of health problems but for asthma, a heart murmur, and alopecia. It is believed that she developed a form of alopecia, or hair loss, from the stress induced from knowledge of Ms. Haynes pregnancy. The defendant was taking medication for asthma prior to her arrest and detention in the instant offense. The defendant's family noted that her onset of asthma occurred after she learned of the affair between her husband and Ms. Haynes. It is noted that the defendant received treatment for her asthma from Dr. Klinger at the Lansdale Medical Group. The defendant's heart murmur is not problematic. A letter sent to Lansdale Medical Group at 801 South Broad Street, Lansdale, Pennsylvania, was returned to sender, attempted not known, unable to forward. The defendant's husband confirmed that the defendant was treated for asthma at the Lansdale Medical Group.

69. The defendant stands five feet tall and weighs approximately 100 pounds. She has brown eyes

and black hair. The defendant reported having a tattoo of a butterfly on the back of her left shoulder. She did not report having any other identifying marks upon her person.

Mental and Emotional Health

70. The defendant reported no history of mental or emotional problems and no history of treatment for such problems. It is noted that the defendant's husband informed that the defendant seemed depressed after learning of his affair with Ms. Haynes. The defendant's attorney informed that the defendant will be undergoing a mental health evaluation prior to sentencing. A copy of the mental health evaluation completed by Steven E. Samuel, Ph.D. was forwarded to the probation officer as of May 16, 2008. A copy is also expected to be forwarded to the Court. In brief, Dr. Samuel concluded, "it is my opinion, stated within a reasonable degree of psychological certainty, that Ms. Bond committed the crimes which resulted in her arrest while suffering from a significantly reduced mental capacity." Dr. Samuel believes that the defendant "knew what she was doing was wrong but that she was unable to control behavior she knew was wrongful" due to "the intense level of anxiety and depression in her which was in response to learning her husband and 'sister' (e.g. Myrlinda Haynes) having betrayed her." Dr. Samuel also concluded that the instant offense was out-of-character for the defendant, and she is not likely to recidivate.

Substance Abuse

71. The defendant reported no history of alcohol or drug use and no history of treatment for substance abuse.

Education and Vocational Skills

72. The defendant completed high school in Barbados. However, she stated that she earned her GED in Pennsylvania after immigrating to the United States in 1995. The probation officer is awaiting confirmation from the Department of Education for the Commonwealth of Pennsylvania.

73. The defendant also began attending the Community College of Philadelphia in 1995. She advised that she took classes between 1995 and 1997 but did not obtain any degree. The Community College of Philadelphia confirmed the defendant's attendance between the summer of 1995 and the summer of 1997. The Community College of Philadelphia also noted that she attained an associates degree in general studies.

74. The defendant next attended Thomas Jefferson University Hospital to study medical technology. She completed the course work over two years and earned her bachelor of science degree in 1999. The defendant later returned to Thomas Jefferson University Hospital to study microbiology. Thomas Jefferson University confirmed that the defendant attended their facility between the spring of 2002 and June 4, 2004, and graduated from the Jefferson College of Graduate Studies with a masters of science in microbiology. The probation officer is awaiting a

response from another office within Thomas Jefferson University Hospital regarding the defendant's bachelors degree.

75. The defendant continued in her pursuit of a higher education by completing her MBA degree through an online or internet-based program with Bake College, located in Flint, Michigan. Baker College confirmed that the defendant completed course work between April 2005 and August 2006 and graduated with a masters of business administration.

76. The defendant does not have any other specialized training beyond her reported education. She holds no professional licenses and has no military service history.

Employment Record

77. As noted in the Offense Conduct section, the defendant was employed as a level 5 technical assistant in the CIS / Biocides organization for Rohm and Haas at its Spring House Technical Center between December 11, 2000,and November 2, 2006. The defendant left this position for new job with Cholestech working out of her work in Lansdale, Pennsylvania. Cholestech confirmed their employment of the defendant as a technical consultant between November 3, 2006, and June 19, 2007. She received an annual salary of $58,741.54. A Detailed FICA Earnings and Employment statement from the Social Security Administration (SSA records) also confirm the defendant's work history with Rohn and Haas and Cholestech.

78. The defendant prior work history included part time employment as a medical technician with Mercy-Suburban Hospital, located in Conshohocken, Pennsylvania, between 2001 and 2006, full time employment as a medical technical with Thomas Jefferson University Hospital between 1998 and 2000, and one year employment as an accounts payable clerk with EMSL Analytical, Inc., located in Westmont, New Jersey. EMSL was unable to confirm the defendant's prior employment with their company in or about 1997. However, SSA records show earnings from employment with EMSL in the amounts of $3,120.00 in 1997 and $1,714.00 in 1998. SSA records also confirms her employment with Mercy-Suburban Hospital and Thomas Jefferson University Hospital.

Financial Condition: Ability to Pay

79. The defendant was unable to provide detailed information regarding her finances due to her state of imprisonment. However, she did provide as much information as possible. The defendant declared having two individually held personal accounts with Commerce Bank and one jointly held account with her husband at Wachovia Bank. She could not provide current balances. The defendant's husband informed that the Commerce Bank accounts were emptied. The Wachovia Bank account is used to pay bills, and it oftentimes has a balance below $100.00.

80. The defendant next declared having a variable annuity and an IRA with PrimeAmerica, valued at approximately $50,000 and $20,000 respectively. The defendant's husband later

advised that the IRA with MetLife is valued at approximately $46,000. She also noted that her husband has two retirements accounts, an IRA with PrimeAmerica and a 401K. She did not know the values of these accounts. The defendant's husband confirmed the value of the defendant's IRA and PrimeAmerica account. He also informed that his 401K account is valued at approximately $80,000 and his PrimeAmerica account has about the same value as the defendant's account. The defendant further declared having two other investment accounts, one of which is valued at approximately $7,000. She did not know the value of the other investment account. The defendant's husband noted that other investments were liquidated in order to pay legal fees.

81. The defendant holds one term life insurance policy with a face value of $400,000. The policy has no cash surrender value. She is also the owner of a 2007 Saturn Ion, valued at $14,000. The defendant also noted that she obtained a loan to purchase this vehicle. The loan balance is approximately $12,000. The defendant's credit report shows one auto loan with Chase with a balance of $12,172. The defendant's husband informed that he attempting to sell this vehicle. The defendant's husband currently leases a 2007 Honda Accord. The lease will expire in eleven months.

82. The defendant jointly owns the property at 1963 Ryans Run, Lansdale, Pennsylvania. She purchased the home with her husband in February 2001 for $154,000. The fair market

value of the home was approximated by the defendant to be work at least $275,000 today. The defendant's husband later informed that the home was recently accessed in 2007 and given a fair market value of $279,000. The home had been listed for sale, but the defendant and her husband later decided to take the home off the market.

83. The balance of the first mortgage was reported as being $139,000. The defendant's credit report showed a Freddie Mac account real estate mortgage account through CitiMortgage with a current balance of $141,405. The defendant said she and her husband recently took a second mortgage on the property. However, she did not know the balance of this mortgage. The defendant's credit report did not show any reason mortgage or personal loan. The defendant's husband explained that a second mortgage for $30,000 was obtained. However, it is was later replaced by an $80,000 home equity line-of-credit from Wachovia. The money paid for legal fees and was used to pay necessary monthly expenses.

84. The defendant informed that she and her husband also jointly own two time shares. One of the time shares was purchased for $14,000 at Shawnee-on-the-Delaware, located in the Poconos Region of Pennsylvania. The other time share was purchased for $12,000 at the shell Vacation Club in Arizona. The fair market values of the time shares is believed to be no different than the reported purchase prices. The defendant's husband confirmed the time shares and noted that he is attempting to sell them.

85. The defendant's other assets include $20,000 in jewelry, $10,000 in household belongings, and $7,000 in art. All of these assets are jointly owned by the defendant and her husband. A search of public records and the interview with the defendant's husband did not reveal any other assets. It is noted that the defendant's husband does have a pending lawsuit. He retained counsel after suffering significant bodily injury in a vehicular accident approximately two years ago. An out-of-court settlement in the amount of $85,000 was recently offered to the defendant by Mr. Bond's attorney, Patrick McDonnell, Esquire.

86. The defendant reported having approximately $50,000 in credit card debt and $50,000 in student loans besides her two mortgages and auto loan. The defendant's credit report shows six charge accounts with balances and eight unsatisfied student loans. The sum of the balances for the six charge account is $51,539, and the sum of the balances for the edit student loans is $35,082. The defendant's husband has some additional debt from credit cards. However, he believed that most was jointly shared with the defendant. The defendant's husband is currently exploring options to consolidate his debt by refinancing his mortgage or other means. He is also trying to have the student loan payments deferred.

87. The defendant's assets, as reported and/or confirmed through public records, conservatively totals $529,000. Likewise, the defendant's liabilities, as reported and/or confirmed through public records, is approximately $250,000.

Therefore, the defendant's total net worth is approximately $279,000.

88. The defendant estimates that her husband earns $6,600 in gross pay each month through his employment with Rohm and Haas. He no longer has the benefit of the defendant's additional income to satisfy their necessary monthly expenses. The primary mortgage, which includes an escrow account, must be in monthly installments of $1,493. The amount of the home equity monthly installment payment is unknown. The monthly utilities, including electric, gas, water/sewer, telephone, basic cable, and internet, is approximately $337.00. The monthly payments towards insurances, including life and auto, is $115, and the minimum installments for the credit cards is at least $500. The necessary monthly expenses total at least $2,445.00.

89. The defendant could not attest to the amounts paid each month for groceries, transportation, and clothing by her husband. She also did now know the amount of child support he is required to pay. An inquiry with Pennsylvania's Child Support website confirms the existence of the court-ordered support in Montgomery County, Pennsylvania. The total arrears is $1,062.18. However, the requirement monthly installment was not shown. The defendant's husband currently pays child support in monthly installments of $1,500. Ten percent of this amount current goes towards arrears. The defendant's husband estimated that half of his net income goes to child support. He has approximately $1,800 in net monthly income, as

well as $400 from his adopted son, for a total of $2,200 to satisfy his necessary monthly expenses.

90. Pursuant to U.S.S.G. § 5E1.2(a), the court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine. The defendant has some assets but no current income due to state of imprisonment. Based upon the defendant's current fiscal status and strong employment history, a minimal fine is a viable option. However, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution. [U.S.S.G. § 5E1.1(c)]. Restitution may be an issue in this case. The victim has submitted an affidavit with the probation officer in which she reports having more than $17,000 in expenses as a result of the instant offense. The Court may consider the imposition of restitution as part of the sentence.

91. If the defendant is incarcerated, payment on a fine or restitution can commence through the Bureau of Prisons Inmate Financial Responsibility Program. An inmate participating in this program will be able to contribute half of monthly prison work earnings, for every month of imprisonment served, toward any immediately due fine or restitution.

PART D. SENTENCING OPTIONS

Custody

92. **Statutory Provisions:** The maximum term of imprisonment for Counts One and Two is life, pursuant to 18 U.S.C. § 229(a). The maximum

term of imprisonment for Counts Three and Four is five years, pursuant to 18 U.S.C. § 1708.

93. **Guideline Provisions:** Pursuant to U.S.S.G. Chapter 5, Part A, based on a total offense level of 27 and a criminal history category of 1, **the guideline range for imprisonment is 70 to 87 months**.

Impact of the Plea Agreement

94. The plea agreement did not contain any stipulations to the determination of the offense level but for the three-level reduction to the offense level for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1(a) and (b).

Supervised Release

95. **Statutory Provisions:** For Courts One and Two, if a term of imprisonment is imposed, the Court may impose a term of supervised release of not more than five years. 18 U.S.C. § 3583(b)(1). For Counts Three and Four, if a term of imprisonment is imposed, the Court may impose a term of supervised release of not more than three years. 18 U.S.C. § 3583(b)(2). The defendant must submit to one drug test within 15 days after commencing supervised release and at least two periodic tests thereafter, unless the Court determines, based on reliable information, that there is low risk of future substance abuse, pursuant to 18 U.S.C. § 3583(d).

96. **Guideline Provisions:** For Counts One and Two, the guideline range for a term of supervised release is three to five years, pursuant to U.S.S.G. § 5D1.2(a). For Counts Three and Four, the guideline range for a term of supervised release is

two to three years, pursuant to U.S.S.G. § 5D1.2(a). If a sentence of imprisonment of one year or less is imposed, a term of supervised release is not required but is optional, pursuant to U.S.S.G. § 5D1.1(b). Supervised release is required if the Court imposes a term of imprisonment of more than one year, unless a departure is granted in accordance with the Application Notes of U.S.S.G. §§ 5D1.1 and 5D1.2.

Probation

97. **Statutory Provisions:** The defendant is not eligible for probation because Counts One and Two in the instant offense are Class A felonies. 18 U.S.C. § 3561(a)(1).

98. **Guideline Provisions:** The defendant is not eligible for probation because Counts One and Two in the instant offense are Class A felonies. U.S.S.G. § 5B1.1(b)(1).

Possible Special Conditions

99. Due to the defendant's history and/or nature of the instant offense(s), the following special conditions of community supervision, not specifically authorized by statute, should be considered at sentencing: financial disclosure, financial restrictions, and no contact, directly or indirectly, with the victim(s) of the instant offense.

Occupational Restrictions

100. **Statutory Provisions**: Pursuant to 18 U.S.C. §§ 3563(b)(6) and 3583(d), the Court has the discretion to impose a condition of probation or supervised release requiring that the defendant

refrain from engaging in a specific occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business or profession only to a stated degree or under stated circumstances.

111. **Guideline Provisions**: Pursuant to U.S.S.G. § 5F1.5(a), the Court may impose a condition of probation or supervised release prohibiting the defendant from engaging in a specific occupation, business or profession or limiting the terms on which the defendant may do so, only if it determined that (1) a reasonably direct relationship existed between the defendant's occupation, business or profession and the conduct relevant to the offense of conviction; and (2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted. U.S.S.G. § 5F1.5(b) specifies that if the Court decides to impose such a condition, it shall be for the minimum time and to the minimum extent necessary to protect the public.

DNA Collection

102. Titles 18 U.S.C. §3563(a) and 18 U.S.C. § 3583(d) require persons convicted of federal felonies to cooperate in the collection of a DNA sample. The defendant's current offense or a prior federal conviction is a felony.

Fines

103. **Statutory Provisions**: The maximum fine for each of Counts One, Two, Three and Four is $250,000 or twice the loss or gain caused by the offense, whichever is greater, pursuant to 18 U.S.C. §3571. The Criminal Fine Improvement Act of 1987 is applicable. Any fine exceeding $2,500, not satisfied within 15 days, will be charged interest at a rate determined by the U.S. Treasury auctions. If a defendant is unable to pay interest, the Court may waive the interest, limit the total interest to a specific dollar amount, or limit the time of interest accrual. See 18 U.S.C. § 3612(f). The liability to pay a fine terminates the later of 20 years from the entry of judgment or 20 years after the release from imprisonment. See 18 U.S.C. § 3613(b). Fine payments, as well as the special assessment, should be made payable to Clerk, U.S. District Court. A special assessment of $100 per count, for a total special assessment of $400, is mandatory and due at sentencing, pursuant to 18 U.S.C. §3013.

104. **Guidelines Provisions**: The fine range for the instant offense is from $12,500 to $125,000, pursuant to U.S.S.G. § 5E1.2(c)(3). The court shall impose a fine in all cases except where the defendant established that he is unable to pay and is not likely to become able to pay any fine, pursuant to U.S.S.G. § 5E1.2(a).

Restitution

105. Restitution is not an issue in this case.

PART E. FACTORS THAT MAY WARRANT DEPARTURE

106. The probation officer has no information concerning the offense or the offender which would warrant a departure from the advisory sentencing guidelines. It is noted that the defense will present testimony of a forensic psychologist who will testify as to the defendant's diminished capacity at the time of the commission of the offense. The defense believes a downward departure, pursuant to U.S.S.G. § 5K2.13. The Court may consider this departure option.

PART F. FACTORS THAT MAY WARRANT A SENTENCE OUTSIDE OF THE GUIDELINES SYSTEM

107. The probation officer has not identified possible grounds for a sentence outside of the advisory guidelines system. The defense asserts that this case is outside the heartland of case for which the application of U.S.S.G. §2M6.1 is warranted. The defense is also presenting psychological evidence to show that the instant offense was out of character for the defendant and that she had committed it while "suffering from a significantly reduced mental capacity." The Court may consider these as factors supporting a variance.

Respectfully submitted,

DANIEL W. BLAIIUSCH
Chief U.S. Probation Officer

By: /s/ Alexander T. Posey
Alexander T. Posey
Senior U.S. Probation Officer

Approved:

/s/ _____ 5/23/08

Sandra Luehrs-Shaw Date
Supervising U.S. Probation Officer

ADDENDUM TO THE PRESENTENCE REPORT

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES v. CAROL ANNE BOND, DOCKET NO. 07-00528-01

Subsequent to the disclosure of the draft presentence report, the Probation office received additional information, now included in Paragraph(s) 3, 23,24, 25, 29, 32, 60 (footnote only), 62 (footnote only), 68, 70, 90, 99, 106, and 107, which does not impact the guideline applications as stated in the draft presentence report. The Probation office made other changes to the draft presentence report, now included in Paragraph(s) 37, 38, 39, 42, 45, 47, 93, and 104, which altered the original guideline calculations.

OBJECTIONS

By the Government

The government did not file any formal objections to the draft presentence report. However, the government contends that the two-level upward adjustment, pursuant to U.S.S.G. § 3A1.1, for vulnerable victim is applicable since Myrlinda Haynes' child may have been targeted based on the fact that the back doors of Haynes' vehicle were consistently and repeated laced with toxic chemicals.

Response:

The Probation office declined to apply the enhancement for the reasons articulated in the draft presentence report. Harm could have come to the child but did not through the events of the instant

offense. The Probation office has decided to maintain its position and give the defendant the benefit of the doubt. It is a factor that the Court may wish to consider in its sentence in the event that the Court comes to the same conclusion. The Court will need to resolve this matter, pursuant to U.S.S.G. § 6A1.3, at the time of sentencing.

By the Defendant

Objection No. 1:

The defense objects to the two-level upward adjustment, pursuant to U.S.S.G. § 3B1.3, presented in Paragraph 40. The defense contends that the defendant's position at Rohm and Haas does not merit upward adjustment as she did not exercise discretionary or supervisory authority and her position did not grant her greater access to chemicals to other employees whose job titles were equal to, lower, or greater than her own. The defense also compares the defendant's position to that of a bank teller and presents case law, including the Third Circuit's three-prong test from *United States v. Pardo*, 25 F.3d 1187, 1191 (3d Cir. 1994). For these reasons, the defense believes Paragraph 40 should be deleted.

Response:

The Probation office refined its position in Paragraph 40 based upon the objection by the defense. The Probation office believes the two-level upward adjustment is applicable, based upon the three-prong test found in *United States v. Pardo*, 25 F.3d 1187, 1191 (3d Cir. 1994). Furthermore, the defendant, a trained microbiologist through academic and on-the-job training, possessed a special

skill beyond that of the average individual which enabled her to safely obtain, transport, and use the toxic chemicals (i.e., the chemical weapon) in the commission of the instant offense without bringing harm to herself or others beyond the intended target victim. Even if the defendant obtained the chemicals outside of Rohm and Haas, she still possessed the special skill and training to know what effect certain toxic chemicals would have upon a human being. The defendant may not know wanted to bring about Ms. Haynes' or her child's death. However, she committed the instant offense, essentially an aggravated assault using a chemical weapon, to bring harm to Ms. Haynes. Therefore, the defendant would have chosen the toxic chemicals she did based upon learned knowledge of the effect that they would have upon the victim. As noted in the presentence report, the victim felt a burning sensation after touching the one toxic chemical placed on her vehicle's door handle by the victim.

The Probation office believes the defendant's position at Rohm and Haas and/or her special skill in microbiology and knowledge of chemicals significantly contributed to the commission of the instant offense. Pursuant to U.S.S.G. § 6A1.3, the Court will need to resolve this matter at the time of sentencing.

Respectfully submitted,

DANIEL W. BLAHUSCH
Chief U.S. Probation Officer

By: /s/ Alexander T. Posey
Alexander T. Posey
Senior U.S. Probation Officer

Approved:

/s/ 5/23/08

Sandra Luehrs-Shaw Date
Supervising U.S. Probation Officer

REPLY BRIEF

168 (B)

JUL 20 2010

No. 09-1227

In the
Supreme Court of the United States

CAROL ANNE BOND,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF FOR PETITIONERS

The government's brief confesses error and acknowledges that the court of appeals was wrong to deny Ms. Bond standing to challenge the federal statute under which she was convicted. This Court should therefore grant Ms. Bond's petition and accept the government's suggestion that the judgment below cannot stand.

The Court should not, however, accept the government's proposed remedy—a summary order that grants, vacates, and remands ("GVR") for further consideration. The government's GVR proposal ignores that this is not an ordinary confession of error case for at least two reasons: *First*, the error that the government belatedly recognizes goes to the courts' Article III jurisdiction and specifically to petitioner's standing. Because standing is an issue that courts must consider *sua sponte* and notwithstanding the parties' agreement, it is not a matter on which the court of appeals may simply reverse course in light of the government's concession. *Second*, and relatedly, the court of appeals reached its conclusion based on both its reading of this Court's decision in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939), and its invocation of the principle reflected in *Rodriguez de Quijas v. Shearson*, 490 U.S. 477 (1989), that it is not for the lower courts to anticipate the overruling of this Court's precedents.

In these circumstances, a GVR is inappropriate and not likely to produce anything other than further delay. While there has been debate about the proper use of the GVR power, we are not aware

of any case remanding for reconsideration in light of a confession of error when the issue the court of appeals must revisit is a standing question and when the lower court has indicated that it considers itself bound by this Court's precedent. Granting a GVR in these circumstances would go far beyond the "most questionabl[e]" category of cases where the Court has previously been willing to GVR in light of a government confession of error. *Stutson v. United States*, 516 U.S. 177, 182 (1996) (Scalia, J., dissenting). The far better course is either to summarily reverse the decision below or to consider the continuing validity of *Tennessee Electric* upon plenary review.

I. The Parties Agree That The Third Circuit's Decision Should Not Be Allowed To Stand.

Both sides agree that the Third Circuit's decision is wrong and should not be allowed to stand. In a dramatic reversal of position, the government now concedes that Ms. Bond has standing to challenge the federal statute under which she was prosecuted as beyond Congress's enumerated powers and inconsistent with the Tenth Amendment. *See* U.S. Br. 6. As the government's brief explains, the Third Circuit's decision misconstrues *Tennessee Electric* and overlooks other relevant precedent. *Id.* at 6–16. The government thus embraces the premise of Ms. Bond's petition: when an individual is "subject to loss of liberty or property as the result of a federal statute regulating her primary conduct," there is no standing bar insulating the federal statute from judicial review. *Id.* at 12.

The judgment below should therefore be reversed. Because Ms. Bond has standing to challenge the federal statute under which she was convicted, this case should be sent back to the court of appeals with instructions to resolve the serious constitutional claims that Ms. Bond has raised.

II. The Court Should Summarily Reverse The Judgment Below Or, In The Alternative, Grant Plenary Review.

Although the government concedes that the decision below is manifestly incorrect, it urges the Court to afford the Third Circuit an opportunity to reconsider its decision. U.S. Br. 16–17. According to the government, merely because it has conceded error, there "is a reasonable likelihood that the court of appeals on remand will recognize" that Ms. Bond has standing. But, with all respect, that assessment ignores both that the issue is one of Article III standing, as to which the views of the parties do not relieve the court of its independent obligation to ensure that standing exists, and that the Third Circuit stated that it found standing absent based on its reading of precedent from this Court that the court of appeals was not free to ignore. An open-ended remand would do nothing to resolve confusion within the lower courts, and the "reasonable likelihood" is that the Third Circuit would reinstate the decision it believed itself to be duty-bound to reach. A GVR under these circumstances would produce only inequitable delay.

1. Contrary to the government's assertions, there is no reasonable basis for presuming that the court of appeals will simply change its standing ruling without more substantial direction from this

Court. The Third Circuit fully considered the question of Ms. Bond's standing, after raising the issue *sua sponte* and requesting supplemental briefing. It then found standing absent, determined that its decision was compelled by *Tennessee Electric*, and removed any doubt on that score by invoking *Shearson*. There have been no "intervening developments" in this Court's jurisprudence that "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Nor has the government conceded ultimate error and moved to vacate Ms. Bond's conviction. Instead, the government has merely revised its legal position on the threshold question of standing.

In seeking a remand without reversal, the government effectively urges the Court to "assume that a court of appeals ... adopted a legal position only because the government supported it." *Stutson*, 516 U.S. at 183 (Scalia, J., dissenting). But that assumption makes no sense in the context of this case. Standing is a jurisdictional prerequisite that the court of appeals had an "independent obligation" to resolve. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1152 (2009). As the Third Circuit recognized in an opinion authored by the same judge who authored the decision below, standing cannot be conceded or conferred by agreement of the parties. *See Golden v. Government of V.I.*, 47 Fed. Appx. 620, 622 (3d Cir. 2002) (Ambro, J.); *Beck v. Alabama*, 447 U.S. 625, 632 n.6 (1980) ("the parties of course cannot confer jurisdiction ... by agreement"). Because standing is jurisdictional, the government's

concession of error is not "reasonably probably entitled to deference" or even "potentially determinative." *Lawrence*, 516 U.S. at 172.

Moreover, the government's new position that *Tennessee Electric* is not controlling would not be a new argument for the Third Circuit; it is the same position that Ms. Bond unsuccessfully advocated below. The Third Circuit rejected that position, not because it deferred to the government, but because it deferred *to this Court* and viewed itself as bound by *Tennessee Electric*. App. 15 (citing *Shearson*, 490 U.S. at 484). Similarly, although the government argues that *Pierce County v. Guillen*, 537 U.S. 129 (2003), confirms that Ms. Bond has standing, *see* U.S. Br. 12–13, the Third Circuit already considered and rejected that argument. In the Third Circuit's view, *Pierce* "does no more than indicate an interest of at least four Justices in *Tennessee Electric*'s binding status." App. 15.

Because there have been no intervening developments in the Court's jurisprudence, the government suggests that the Third Circuit might be inclined to reverse course in light of its recent decision in *United States v. Shenandoah*, 595 F.3d 151 (3d Cir. 2010). In that case, the court of appeals assumed (without discussion) that a criminal defendant enjoyed standing to challenge a federal statute as exceeding Congress's commerce clause authority, but also held that the defendant lacked standing to bring a Tenth Amendment challenge to a requirement that state law enforcement accept registrations from federally mandated sex offender programs. *See* App. 17.

As the government acknowledges, the distinctions it seeks to draw in *Shenandoah* are at best implicit. *See* U.S. Br. 17. *Shenandoah* does not mention either *Tennessee Electric* or the Third Circuit's decision below. Moreover, although it is true that *Shenandoah* rejected the defendant's standing to bring a Tenth Amendment challenge to the statute's alleged infringement on state sovereignty, when it came to the defendant's commerce clause claim, the Court did not characterize that challenge as a Tenth Amendment claim or even note any question of standing. Instead, *Shenandoah*'s discussion of the commerce clause challenge involved the type of "drive by" exercise of jurisdiction that the Court has indicated lacks any precedential force. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) ("'drive-by jurisdictional rulings' ... should be accorded 'no precedential effect'") (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 91 (1998)). Accordingly, there is no basis for assuming that the Third Circuit would give weight to *Shenandoah*'s unexplained exercise of jurisdiction, let alone view that decision as grounds for reconsidering its interpretation of *Tennessee Electric*. In fact, the full court of appeals denied Ms. Bond's request for rehearing en banc a mere two months before the *Shenandoah* panel issued its decision. App. 25.

A GVR in this case would thus put the Third Circuit in an untenable position. To reach the correct legal result, the court of appeals would either have to assume that the Court's GVR is a de facto summary reversal, *but see Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001), or else view the government's change in position as sufficient for the court to admit

that it was flatly wrong in concluding that *Tennessee Electric* (and *Shearson* principles) required it to deny standing. Putting the Third Circuit in that position is inconsistent with the respect owed to the lower courts of appeals. *Lawrence*, 516 U.S. at 610. When the issue is standing and the court of appeals has already indicated that it is bound by this Court's precedent, a GVR is a non-sequitur.

2. A GVR also will not resolve the confusion among the lower courts. As both the government and Ms. Bond argued below, and as the Third Circuit concluded, the "court of appeals are split on whether private parties have standing to challenge a federal act on the basis of the Tenth Amendment." App. 12. The government suggests that this split can be resolved by drawing a distinction between Tenth Amendment claims that challenge a statute as exceeding Congress's enumerated powers, and those that challenge "unwarranted intrusions into state sovereignty." U.S. Br. 6. But that distinction eluded the government below and is not explicit in any of the lower court cases cited by the government.

Courts have not distinguished between "state-sovereignty-oriented Tenth Amendment" claims and claims "based on the scope of Congress's Article I authority." *Id.* at 14. They have instead focused on whether *Tennessee Electric*'s single-sentence suggestion that private parties lack standing to press Tenth Amendment challenges is binding or merely "confusing dicta" overtaken by subsequent decisions. Pet. 15 (citing cases).

Like the court below, other courts of appeals have held that *Tennessee Electric* is binding and,

applying *Shearson*, have concluded that only this Court has the prerogative to clarify that precedent. *See United States v. Hacker*, 565 F.3d 522, 526 (8th Cir. 2009); *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 236 (2d Cir. 2006); *Medeiros v. Vincent*, 431 F.3d 25, 34 (1st Cir. 2005). These courts have held without qualification that, under *Tennessee Electric*, "private parties lack standing to raise a Tenth Amendment claim." *Hacker*, 565 F.3d at 526. They have thus adopted the same position that the government championed below (as it has in other cases), urging the Third Circuit to "follow *Tennessee Electric* in holding that there is no private party standing to assert a violation of the Tenth Amendment." Gov't C.A. Supp. Br. 4–5; *see also* Appellee's Br., *Joe's v. Norton*, No. 03-16520, 2003 WL 22767945, at *41–43 (9th Cir. Oct. 14, 2003); Appellant's Br., *United States v. Pitner*, No. 01-30055, 2001 WL 34094788, at *31–32 (9th Cir. Aug. 21, 2001); Appellee's Br., *Gillespie v. City of Indianapolis*, No. 98-2691, 1998 WL 34077576, at * 19 (7th Cir. Oct. 29, 1998).

Courts that have reached the opposite conclusion, holding that *Tennessee Electric* is not binding, likewise have not relied on the government's proposed distinction between enumerated and sovereignty-oriented claims. In *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999), for example, the Seventh Circuit addressed what the government might characterize as an enumerated powers claim, holding that a former police officer enjoyed standing to challenge a federal statute prohibiting persons convicted of domestic violence offenses from possessing firearms (the police officer lost his job because, under the

statute, he was unable to carry a firearm). Although the government contested standing and relied on *Tennessee Electric*, the Seventh Circuit concluded that *Tennessee Electric* was not controlling and that "standing barriers have been substantially lowered" as a result of more recent precedent. *Id.* at 700.

Similarly, this Court's decisions cast substantial doubt on whether the Third Circuit on remand would be willing to cabin *Tennessee Electric* in the manner proposed by the government. In *New York v. United States*, the Court held that, because the Tenth Amendment's text is "essentially a tautology," whether "Congress has invaded the province reserved to the States by the Tenth Amendment is ... a question that must be answered by inquiring whether Congress has exceeded the limits of authority bestowed upon it by Article I of the Constitution." *Gillespie*, 185 F.3d at 704 (quoting *New York v. United States*, 505 U.S. 144, 157 (1992)). As the Court explained, the two inquiries are "mirror images" and, therefore, contrary to the government's suggestion, there is no such thing as a separate category of undefined "state sovereignty" claims under the Tenth Amendment that do not also require addressing whether the federal statute is "authorized by one of the powers delegated to Congress in Article I of the Constitution." U.S. Br. 10 (quoting *New York*, 505 U.S. at 155); *see also United States v. Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring) (expressing concern over confusion relating to the Tenth Amendment). Nor, of course, is it obvious why a citizen would lack standing to assert any aspect of the liberty-protecting structural guarantees embodied in the Tenth Amendment. *Cf. Free Enter. Fund v. Public*

Co. Accounting Oversight Bd., No. 08-861, 2010 WL 2555191, at *10 n.2 (June 28, 2010).

Against this backdrop, reversal of the Third Circuit's decision is necessary to return uniformity to the law. The proper approach is not to salvage *Tennessee Electric* by drawing a line between Tenth Amendment challenges complaining about intrusions into state sovereignty and Tenth Amendment challenges complaining that Congress has exceeded its enumerated powers. Instead, the Court should take this opportunity to inter the troublesome language in *Tennessee Electric* and make clear that Tenth Amendment claims are not subject to special standing rules. The Tenth Amendment, "although nominally protecting state sovereignty, ultimately secures the rights of individuals." *Gillespie*, 185 F.3d at 703 (citing *New York*, 505 U.S. at 181). Private citizens have standing to raise Tenth Amendment claims when the federal government exceeds its proper sphere of authority because the federalism principles enshrined in our Constitution were "adopted by the Framers to ensure protection of our fundamental liberties." *United States v. Lopez*, 514 U.S. 549, 552 (1995); *New York*, 505 U.S. at 182.

Accordingly, when confronted with a Tenth Amendment challenge, the lower courts should be instructed to apply the ordinary, well-established tests for standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Parties may lack standing to raise Tenth Amendments claims if they allege only an "undifferentiated, generalized grievance," *Lance v. Coffman*, 549 U.S. 437, 442 (2007), or if their claims rest on the legal rights and

interests of third parties. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11-13 (2004). But a party who has suffered concrete, particularized injury does not lose standing merely because the government might characterize the Tenth Amendment claim as a challenge to an imposition on state sovereignty.

3. The notion that a citizen has standing to protest that the statute under which the government has deprived her of liberty is in excess of Congress's power or otherwise in violation of the Tenth Amendment seems sufficiently straightforward to warrant summary reversal. If the Court believes that interring *Tennessee Electric* requires plenary consideration, then it should grant the petition and appoint an *amicus* to defend the Third Circuit's mistaken judgment. But the Court should not issue a GVR that will provoke only head-scratching by a court of appeals already on record as viewing itself bound by this Court's precedent. As the Court has recognized, where "the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *Lawrence*, 516 U.S. at 168.

Having confessed error as to standing, the government should have taken this opportunity to confess error on the merits and moved to vacate Ms. Bond's unlawful conviction. This local domestic dispute, resulting in a small chemical burn to the thumb of Ms. Bond's husband's paramour, should never have been prosecuted under a federal statute designed to prevent the proliferation of chemical weapons. But absent that concession, the only

appropriate course is to reverse the Third Circuit's misguided standing decision, with instructions for the court of appeals to render a prompt decision on Ms. Bond's constitutional challenge. Ms. Bond has already been held in federal prison for approximately 37 months for a failed assault that, had she been prosecuted and convicted under state law, would have resulted in a prison sentence of at most between 3 and 25 months. Pet. 10. Requiring Ms. Bond to return to the court below for another round of briefing on whether the Third Circuit should change its mind on the threshold standing question carries the significant risk that she will have fully served her unlawful prison sentence before the merits of her constitutional claims are ever resolved.

CONCLUSION

The Court should grant the petition for writ of certiorari and either summarily reverse or grant plenary review.

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JOINT APPENDIX

6

Supreme Court, U.S.
FILED
DEC 3 - 2010
OFFICE OF THE CLERK

No. 09-1227

In the
Supreme Court of the United States

CAROL ANNE BOND,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

CAROL ANNE BOND

RELEVANT DOCKET ENTRIES

No. 2:07-cr-00528-JG-1

Date Filed	#	DOCKET TEXT
06/07/2007	1	COMPLAINT FILED WITH AFFIDAVIT BY POSTAL INSPECTOR RICARDO BORDON as to CAROL ANN BOND (1). (jcz,) [2:07-mj-00684] (Entered: 06/08/2007)
06/08/2007	2	GOVERNMENT'S MOTION AND MEMORANDUM FOR HEARING AND DEFENDANT'S PRETRIAL DETENTION, CERTIFICATE OF SERVICE BY USA AS TO CAROL ANN BOND. (jcz,) [2:07-mj-00684] (Entered: 06/11/2007)

* * *

Date Filed	#	DOCKET TEXT
06/12/2007	4	Minute Entry for proceedings held before Judge L. FELIPE RESTREPO: Initial Appearance as to CAROL ANN BOND held on 6/11/07. No bail is set. Deft. stipulates to probable cause. Court continues Detention Hearing to 6/13/2007 01:30 PM in COURTROOM 5B before MAGISTRATE JUDGE L. FELIPE RESTREPO. Court Reporter ESR. (jcz,) [2:07-mj-00684] (Entered: 06/12/2007)
		* * *
06/15/2007	8	PRETRIAL ORDER OF DETENTION AS TO CAROL ANN BOND THAT DEFT IS HEREBY DETAINED PENDING FURTHER PROCEEDINGS IN THIS MATTER, ETC. Signed by Judge L. FELIPE RESTREPO on 6/13/07.6/15/07 Entered and Copies Mailed, E-Mailed. (cmc) [2:07-mj-00684] (Entered: 06/15/2007)
06/26/2007	9	ARREST Warrant Returned Executed on 6/08/07 in case as to CAROL ANN BOND. (jcz,) [2:07-mj-00684] (Entered: 06/26/2007)
		* * *
09/05/2007	14	INDICTMENT as to CAROL ANNE BOND (1) count(s) 1-2, 3-4. (cw,) (Entered: 09/06/2007)
		* * *

Date Filed	#	DOCKET TEXT
10/26/2007	24	MOTION to Suppress Evidence by CAROL ANNE BOND, Memo of Law, CERT. OF SERVICE, (Proposed Order). (Attachments: #1 Exhibit 1 (Residence search warrant package) #2 Exhibit 2 (Vehicle search warrant package)) (REED, ERIC) Modified on 10/29/2007 (cmc). (Entered: 10/26/2007)
		* * *
10/29/2007	25	RESPONSE in Opposition re 24 MOTION to Suppress filed by USA, CERT. OF SERVICE, (Proposed Order) (KURLAND, AMY) Modified on 10/30/2007 (cmc). (Entered: 10/29/2007)
		* * *
10/31/2007	27	MOTION to Dismiss *Counts I and II of the Indictment* by CAROL ANNE BOND. (Attachments: #1 Appendix Index of Exhibits #2 Exhibit 1--Chemical Weapons Convention Excerpts #3 Exhibit 2--ICRC Advisory #4 Exhibit 3--Executive Order 13128 #5 Exhibit 4--Federal Offense Table #6 Exhibit 5--AG Statement in Support of CWC) (REED, ERIC) (Entered: 10/31/2007)

Date Filed	#	DOCKET TEXT
10/31/2007	28	Minute Entry/REPORT OF PRETRIAL OR SETTLEMENT CONFERENCE for proceedings held before Judge JAMES T. GILES Telephone Conference as to CAROL ANNE BOND held on 10/30/2007. TOTAL TIME OF CONFERENCE: 15 MINUTES. (ke) (Entered: 10/31/2007)
11/06/2007	29	Brief in Support to Motion by CAROL ANNE BOND re 24 MOTION to Suppress, CERT. OF SERVICE, (Proposed Order) (REED, ERIC) Modified on 11/7/2007 (cmc). (Entered: 11/06/2007)
11/13/2007	30	RESPONSE in Opposition re 27 MOTION to Dismiss *Counts I and II of the Indictment* filed by USA, CERT. OF SERVICE. (KURLAND, AMY) Modified on 11/14/2007 (cmc.) (Entered: 11/13/2007)
11/15/2007	31	Brief in Support to Motion by CAROL ANNE BOND re 27 MOTION to Dismiss *Counts I and II of the Indictment*, CERT. OF SERVICE, (Proposed Order) (REED, ERIC) Modified on 11/16/2007 (cmc). (Entered: 11/15/2007

* * *

Date Filed	#	DOCKET TEXT
11/19/2007	33	Minute Entry for proceedings held before Judge JAMES T. GILES Hearing - Deft's. Motion to Dismiss Counts 1 & 2 as to CAROL ANNE BOND held on 11/19/2007. Counsel argues to Court. Govt's. case: Witness sworn. Court rules: Deft's. motion to dismiss counts 1 & 2 - DENIED. Deft's. motion to suppress Deft's. statement - DENIED. Court Reporter ESR, (ke) (Entered: 11/19/2007)
11/19/2007	34	ORDER DENYING 24 MOTION TO SUPPRESS STATEMENTS FILED BY CAROL ANNE BOND AND 27 MOTION TO DISMISS COUNTS I AND II OF THE INDICTMENT FIELD BY CAROL ANNE BOND FOR THE REASONS STATED BY THE COURT AT THE RECORD HEARING HELD THIS DATE IN THE ABOVE MATTER, ETC. Signed by Judge JAMES T. GILES on 11/19/07.11/19/07 ENTERED AND COPIES E-MAILED. (ke) (Entered: 11/19/2007)

* * *

Date Filed	#	DOCKET TEXT
12/05/2007	36	Minute Entry for proceedings held before HONORABLE JAMES T. GILES Change of Plea Hearing as to CAROL ANNE BOND held on 12/5/07. Plea entered as to CAROL ANNE BOND (1) Guilty Counts 1-4. PSI Ordered. Sentencing date: 3/19/08 at 12:00 pm. Bail status: federal custody. Court Reporter ESR. (ke) (Entered: 12/05/2007)
12/05/2007	37	Plea Document as to CAROL ANNE BOND, (ke) (Entered: 12/05/2007)
		* * *
05/29/2008	41	SENTENCING DOCUMENT as to CAROL ANNE BOND with Certificate of Service. (SHAPIRO, PAUL) Modified on 5/30/2008 (le,). (Entered: 05/29/2008)
		* * *

Date Filed	#	DOCKET TEXT
06/04/2008	43	Minute Entry for proceedings held before HONORABLE JAMES T. GILES Sentencing held on 6/3/08 for CAROL ANNE BOND (1), Count(s) 1-2, IMPRISONMENT 6 YEARS, SUPERVISED RELEASE 5 YEARS AS TO ALL COUNTS, SPECIAL ASSESSMENT $400.00 AS TO ALL COUNTS, FINE $2,000.00 AS TO ALL COUNTS, RESTITUTION $8,558.29 AS TO ALL COUNTS; Count(s) 3-4, IMPRISONMENT 5 YEARS. Court Reporter ESR. (ke) (Entered: 06/05/2008)
06/04/2008	44	JUDGMENT AS TO CAROL ANNE BOND (1), Count(s) 1-2, IMPRISONMENT 6 YEARS, SUPERVISED RELEASE 5 YEARS, SPECIAL ASSESSMENT $400.00 AS TO ALL COUNTS, FINE $2,000.00 AS TO ALL COUNTS, RESTITUTION $8,558.29 AS TO ALL COUNTS; Count(s) 3-4, IMPRISONMENT 5 YEARS, SUPERVISED RELEASE 3 YEARS. Signed by HONORABLE JAMES T GILES on 6/4/08.6/5/08 Entered and Copies Mailed, E-Mailed BY CHAMBERS. (ke) (Entered: 06/05/2008)

Date Filed	#	DOCKET TEXT
06/10/2008	45	NOTICE OF APPEAL by CAROL ANNE BOND RE: JUDGMENT with Certificate of Service. (REED, ERIC) Modified on 6/11/2008 (ke). Modified on 6/11/2008 (le,). (Entered: 06/10/2008)

* * *

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA

v.

CAROL ANNE BOND

RELEVANT DOCKET ENTRIES

No. 08-2677

Date Filed	DOCKET TEXT
06/12/2008	CRIMINAL CASE DOCKETED. Notice filed by Carol A. Bond. (SMW)
	* * *
09/05/2008	PRESENTENCE REPORT, received. (4 copies) UNDER SEAL. SEND TO MERITS PANEL. (LAL)
09/08/2008	ELECTRONIC 1st STEP BRIEF on behalf of Appellant Carol A. Bond, filed. Pages: 51, Words: 11,595, Manner of Service: mail, Certificate of Service dated 09/05/2008. (LAL)
	* * *

Date Filed	DOCKET TEXT
11/13/2008	ELECTRONIC 2nd STEP BRIEF on behalf of Appellee USA, filed. Pages: 64, Words: 10925, Manner of Service: mail, Certificate of Service dated 11/13/2008. (MS)
	* * *
03/23/2009	ARGUED on Monday, March 23, 2009 before RENDELL, AMBRO and JORDAN, Circuit Judges. Robert E. Goldman arguing for Appellant Carol A. Bond; Paul G. Shapiro arguing for Appellee United States of America. (PM)
08/14/2009	CLERK'S LETTER to counsel written at the direction of the Court. The Court requests counsel to provide supplemental memoranda, not to exceed five single-spaced pages, discussing the following question: Does appellant, Carol Bond, have standing to assert that 18 U.S.C. 229 encroaches on state sovereignty in violation of the Tenth Amendment to the United States Constitution absent the involvement of a state or its instrumentalities? Each party is directed to file the requested memorandum in the Clerk's Office by 4:00p.m. on Tuesday, August 25, 2009. (TLW)

Date Filed	DOCKET TEXT
08/20/2009	ECF FILER: Response filed by Appellee USA to court letter dated 08/14/2009. Certificate of Service dated 08/20/2009.--[Edited 08/20/2009 by TLW] (PGS)
08/25/2009	ECF FILER: Response filed by Appellant Carol A. Bond to court letter dated 8/14/2009. Certificate of Service dated 08/25/2009.--[Edited 08/25/2009 by TLW] (EER)
09/17/2009	PRECEDENTIAL OPINION Coram: RENDELL, AMBRO and JORDAN, Circuit Judges. Total Pages: 28. Judge: AMBRO Authoring. (SMW)
09/17/2009	JUDGMENT, Affirmed. (SMW)
	* * *
11/30/2009	ECF FILER: Petition filed by Appellant Carol A. Bond for Rehearing before original panel and the court en banc. Certificate of Service dated 11/30/2009. (REG)

Date Filed	DOCKET TEXT
12/10/2009	ORDER (SCIRICA, Chief Judge, SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN and HARDIMAN, Circuit Judges) denying Petition for Rehearing before the original panel and the court en banc filed by Appellant Carol A. Bond, filed. Thomas L. Ambro, Authoring Judge. (SMW)

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	VIOLATIONS:
CAROL ANNE BOND	:	18 U.S.C. § 229(a) (using a chemical weapon - 2 counts)
	:	18 U.S.C. § 1708 (theft of mail - 2 counts)

INDICTMENT

COUNT ONE

THE GRAND JURY CHARGES THAT:

At all times material to this indictment:

1. Potassium dichromate was a toxic chemical as defined under 18 U.S.C. § 229F(1)(A) and (8)(A) and had the potential to cause death or permanent harm to humans or animals.

2. 10-cholo-10H-phenoxarsine was a toxic chemical as defined under 18 U.S.C. § 229F(1)(A) and (8)(A) and had the potential to cause death or permanent harm to humans or animals.

3. From in or about December 2000 through on or about November 2, 2006, defendant CAROL ANNE BOND was employed by Rohm and Haas at the Spring House Technical Center as a level 5 technical assistant in the CIS / Biocides organization. At the time of her resignation, her

responsibilities included microbiological challenge testing on plastics samples and some routine analytical work, including high pressure liquid chromatography (HPLC). In this position, she had access to potassium dichromate and 10-cholo-10H-phenoxarsine.

4. From in or about November 2006, through on or about June 7, 2007, in the Eastern District of Pennsylvania and elsewhere, defendant

CAROL ANNE BOND

knowingly acquired, transferred, received, retained, possessed and used a chemical weapon, that is, potassium dichromate, which is a toxic chemical not intended by defendant Bond to be used for a peaceful purpose as that term is defined in Title 18, United States Code, Section 229F(7)(A).

In violation of Title 18, United States Code, Section 229(a)(1).

COUNT TWO

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1 through 3 of Count One are incorporated here.

2. From in or about November 2006, through on or about June 7, 2007, in the Eastern district of Pennsylvania and elsewhere, defendant

CAROL ANNE BOND

knowingly acquired, transferred, received, retained, possessed and used a chemical weapon, that is, 10-cholo-10H-phenoxarsine, which is a toxic chemical not intended by

defendant Bond to be used for a peaceful purpose as that term is defined in Title 18, United States Code, Section 229F(7)(A).

In violation of Title 18, United States Code, Section 229(a)(1).

COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT:

On or about February 26, 2007, in Norristown, in the Eastern District of Pennsylvania, defendant

CAROL ANNE BOND

knowingly stole, took, and abstracted United States mail from a letter box, an authorized depository for mail matter, that is, defendant stole mail from the mailbox of 24 Zummo Way, Norristown, PA.

In violation of Title 18, United States Code, Section 1708.

COUNT FOUR

THE GRAND JURY FURTHER CHARGES THAT:

On or about April 12, 2007, in Norristown, in the Eastern District of Pennsylvania, defendant

CAROL ANNE BOND

knowingly stole, took, and abstracted United States mail from a letter box, an authorized depository for mail matter, that is, defendant stole mail from the mailbox of 24 Zummo Way, Norristown, PA.

In violation of Title 18, United States Code, Section 1708.

A TRUE BILL:

_____

FOREPERSON

_____

PATRICK L. MEEHAN
UNITED STATES ATTORNEY

UNITED STATES
COURT OF APPEALS FOR THE
THIRD CIRCUIT

OFFICE OF THE CLERK
Marcia M. Waldron, Clerk

21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790
Telephone: 215-597-2995
Website: www.ca3.uscourts.gov

August 14, 2009

Via Facsimile
and Electronic Mail

Robert E. Goldman Esq.
Eric E. Reed Esq.
Paul G. Shapiro Esq.

RE: USA v. Carol Bond

Case Number: 08-2677
District Case Number: 2-07 -cr-00528-00 1

Dear Counsel:

The Court requests counsel to provide supplemental memoranda, not to exceed five single-spaced pages, discussing the following question:

> Does appellant, Carol Bond, have standing to assert that 18 U.S.C. § 229 encroaches on

state sovereignty in violation of the Tenth Amendment to the United States Constitution absent the involvement of a state or its instrumentalities?

Each party is directed to file the requested memorandum in the Clerk's Office by 4:00 p.m. on Tuesday, August 25,2009.

Please file the responses to the Court's letter using the "response event" under the argument notices and acknowledgment category in CM/ECF.

Very truly yours,

/s/ Marcia M. Waldron
Marcia M. Waldron, Clerk

By: */s/ Tiffany Washington*
Tiffany Washington, Calendar Clerk
267-299-4905

U.S. Department of Justice
United States Attorney
Eastern District of Pennsylvania
615 Chestnut Street, Suite 1250
Philadelphia, Pennsylvania 19106-4476
(215) 861-8200

August 20, 2009

Marcia M. Waldron, Clerk
United States Court of Appeals
United States Courthouse, 21st Floor
601 Market Street
Philadelphia, PA 19106

Re: United States v. Carol Bond
No. 08-2677

Dear Ms. Waldron:

By letter dated August 14, 2009, the Court requested that counsel file supplemental memoranda of not more than five single-spaced pages addressing whether the appellant has standing to challenge 18 U.S.C. § 229 as infringing the Tenth Amendment. Please accept this letter-memorandum as the government's response to that direction.

Although the government did not recognize the standing issue in the district court or previously in this Court, for the reasons set forth below, the government believes that appellant Carol Bond lacks standing to assert an infringement of state sovereignty in violation of the Tenth Amendment.[1]

[1] The government regrets its oversight. But because "the doctrine of standing . . . goes to the subject matter jurisdiction

The government therefore believes that this Court need not address the merits of that claim.

The question of whether a private party has standing to assert that a statute violates the Tenth Amendment has not been addressed by this Circuit. It has, however, been decided by the Supreme Court. In Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 135-36 (1939), a number of state-chartered electric utilities sued the Tennessee Valley Authority, claiming that the TVA's sale of electricity in competition with them violated the Constitution. One of the claims raised by the utilities was that the TVA's sale of electricity amounted to the "federal regulation of purely local matters reserved to the states or the people by the Tenth Amendment . . . ." Id. at 143. The Supreme Court rejected the Tenth Amendment challenge on its merits, and also held that the utilities were without standing to assert a Tenth Amendment claim: "[T]he appellants, absent the states or their officers, have no standing in this suit to raise any question under the amendment." Id. at 144.

This clear pronouncement of the Supreme Court recently led the Eighth Circuit to reject, on standing grounds, a private party's Tenth Amendment

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of the district court," and because this Court has "an independent obligation to consider jurisdictional issues," the issue of standing "is a threshold question in every federal case." Wheeler v. Travelers Insurance Company, 22 F.3d 534, 537 (3d Cir. 1994) (citations and quotations omitted). As a consequence, a party cannot waive the question of standing. Id. But see UPS Worldwide Forwarding, Inc. v. U.S. Postal Service, 66 F.3d 621, 626 n.6 (3d Cir. 1995) (treating as open in the Third Circuit the question of whether prudential standing, as opposed to constitutional standing, can be waived).

challenge to the Sex Offender Registration and Notification Act, 42 U.S.C. §§ 16901-991. United States v. Hacker, 565 F.3d 522 (8th Cir. 2009). In Hacker, as in this case, a criminal defendant claimed that an indictment should have been dismissed because the underlying federal criminal statute was invalid as violative of the Tenth Amendment. Id. at 523, 525. The Eighth Circuit, relying on Tennessee Electric Power, concluded that it did not have to reach the merits of the Tenth Amendment issue because the defendant, as a private party, did not have standing to assert a Tenth Amendment claim. Id. at 526.[2] Although it acknowledged that the Supreme Court's decision in Tennessee Electric Power may have been somewhat undercut by the passage of time, in the absence of directly contradictory authority from the Supreme Court, the Eighth Circuit determined that it was bound to follow that precedent. Id. at 526-27. Moreover, as the Court pointed out, its decision was consistent with the principle that a person may not assert the rights or interests of a third party. Id.[3]

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[2] In Hacker, as in this case, neither party had addressed standing in the district court or in their briefs before the Court of Appeals. The Eighth Circuit, however, concluded that, because it was a jurisdictional issue, it could be raised by the court at any time. Hacker, 565 F.3d at 525-26 & n.3.

[3] In Hacker, the Court noted that the defendant did not even argue that his interests were aligned with those of the state, and therefore the Court did not have to reach the question of whether to permit private party standing where such alignment does exist. Hacker, 565 F.3d at 527 n.6. Likewise, in this case, Bond cannot argue that her interests are aligned with those of the Commonwealth inasmuch as neither the Commonwealth nor any of its subdivisions have even suggested that they are in the least concerned by the prosecution of cases like Bond's

The issue of private party standing to assert claims under the Tenth Amendment has not received uniform treatment by the circuit courts of appeal that have addressed it. See Hacker, 565 F.3d at 526. Although five circuits (including the Eighth) have concluded that private parties lack standing, the Seventh and Eleventh Circuits have permitted private parties to assert such claims. See id. In the Eleventh Circuit case, Atlanta Gas Light Co. v. U.S. Dept. of Energy, 666 F.2d 1359, 1368 n.16 (11th Cir. 1982), the Court determined that there was standing without ever addressing the Supreme Court's decision in Tennessee Electric Power.

In the Seventh Circuit case, Gillespie v. City of Indianapolis, 185 F.3d 693, 700 (7th Cir. 1999), the Court acknowledged Tennessee Electric Power and its applicability to Tenth Amendment standing. However, the Seventh Circuit dismissed that opinion as undercut by subsequent developments in the law of standing. Id. This Court, however, has firmly recognized that it is not at liberty to disregard an on-point Supreme Court decision merely because its logic may have been undermined by a different line of authority. United States v. Ordaz, 398 F.3d 236, 241 (3d Cir. 2005). The Supreme Court itself has been emphatic on this point. See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which

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under the chemical weapons statute. Indeed, given the large dockets of the state courts, the Commonwealth's interests are promoted by the prosecution of such cases in a federal forum.

directly controls, leaving to this Court the prerogative of overruling its own decisions.")

This Court therefore should, like the Eighth Circuit, adopt the view of the strong majority of the circuits and follow Tennessee Electric Power in holding that there is no private party standing to assert a violation of the Tenth Amendment.

Even apart from the existence of binding precedent, any claim of standing would in any event fail. Given the absence of any alignment of interests between Bond and the Commonwealth of Pennsylvania, and given that Bond cannot show how her rights - as opposed to those of the Commonwealth - would be infringed by a Tenth Amendment violation, she simply has no standing to assert such a violation. Thus, the decision below should be affirmed.

Thank you for your consideration.

Respectfully yours,

MICHAEL L. LEVY
United States Attorney

/s Robert A. Zauzmer
ROBERT A. ZAUZMER
Assistant United States Attorney
Chief of Appeals

/s Paul G. Shapiro
PAUL G. SHAPIRO
Assistant United States Attorney

cc: Robert E. Goldman, Esquire

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

App. No. 08-2677

UNITED STATES OF AMERICA,
Appellee,

v.

CAROL BOND,
Defendant/Appellant.

On Appeal From The United States District Court For The Eastern District Of Pennsylvania In Criminal Case No. 07-528

APPELLANT'S SUPPLEMENTAL MEMORANDUM

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Attorneys for Defendant/Appellant Carol Bond

I. Issue Presented and Answer

The Court requested supplemental memoranda addressing whether Carol Bond has standing to assert that 18 U.S.C. § 229, the statute under which she currently stands convicted, encroaches on state sovereignty in violation of the Tenth Amendment notwithstanding the absence of state action in this case.

Ms. Bond answers the issue in the affirmative, because what the government cites as binding precedent is only dicta when properly read, because the better approach is to allow private citizens to pursue Tenth Amendment claims when, as in this case, the citizen has an appropriate personal stake in the outcome, and because Ms. Bond otherwise satisfies constitutional and prudential standing requirements.

II. Carol Bond Satisfies Article III Standing Requirements

The "irreducible constitutional minimum" of standing sufficient to present a "case or controversy" under Article III of the Constitution contains three elements: (1) the plaintiff must have suffered an "injury in fact" *i.e.*, an invasion of a "legally protected interest" which is both (a) concrete and particularized in that it affects the plaintiff in a personal and individual way, and (b) "actual or imminent, not 'conjectural' or 'hypothetical'"; (2) there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court"; and (3) it must be "likely," as opposed to

merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citing *Allen v. Wright*, 468 U.S. 737, 756 (1984); *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-741, n. 16 (1972); *Whitmore v. Ark.*, 495 U.S. 149, 155 (1990); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

Carol Bond satisfies constitutional standing requirements. She is presently serving a 60-month sentence in a federal detention center following a guilty plea and conviction under a statute that is both unconstitutional on its face and in its particular application to the facts of this case. She thus has an injury in fact. Carol Bond was not prosecuted by state authorities under a state statute mandated by federal legislation such that her injury is remote from federal action. Rather, Carol Bond stands convicted under a federal statute, 18 U.S.C. § 229, implemented under the auspices of the Treaty Power because the federal government lacked any other basis in the Constitution to do so. The causal connection could not be clearer. Carol Bond also satisfies the third element of Article III standing in that either invalidating 18 U.S.C. § 229 entirely or its application in this particular case will reverse her conviction.

III. Carol Bond Satisfies Prudential Standing Requirements

"[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and

interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Such a rule is a matter of prudence to regulate the scope of the federal judicial function, and arises in matters where the plaintiffs have only a tangential, generalized, or indirect "stake" in the outcome. This case is distinguishable from such concerns in that Carol Bond does, in fact, assert her own rights by challenging the Tenth Amendment violation that 18 U.S.C. § 229 and this prosecution represent.

The government argues that Carol Bond lacks standing to assert the Tenth Amendment encroachment issue, relying on *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118 (1939) and its progeny. In that case, a group of local power producers and distributors sued to prevent the Tennessee Valley Authority ("TVA") from generating and selling electricity (at least at rates lower than those offered by the complainants). *Id.*, 134-35. Among other arguments, the complainants challenged the TVA's activities as violating the Tenth Amendment, arguing that such operations on the TVA's scale amounted to indirect regulation of electricity rates, which they asserted was tantamount to "federal regulation of the internal affairs of the states." *Id.*, 136. The Supreme Court resolved the Tenth Amendment issue, ruling that "The sale of government property in competition with others is not a violation of the Tenth Amendment." *Id.*, 144. Only after so ruling, the Supreme Court added that "As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing in this suit to raise any

question under the amendment." *Id.* However, given that the Supreme Court had already given its ruling and rationale, the latter passage is textbook dicta and thus does not bind this Court.

As the federal government noted, a circuit split exists on the issue posed by the Court. The government focuses and relies on the dicta from *Tenn. Elec. Power* (and cases that follow *Tenn. Elec. Power* and make the same error) to support its argument that Carol Bond lacks standing to challenge 18 U.S.C. § 229 and this prosecution under the Tenth Amendment. The Seventh and Eleventh Circuits follow a different approach, and allow private party standing to assert a violation of the Tenth Amendment. *See Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999); *Dillard v. Baldwin County Commissioners*, 225 F.3d 1271 (11th Cir. 2000); *Seniors Civil Liberties Assoc., Inc. v. Kemp*, 965 F.2d 1030 (11th Cir. 1992); *Atlanta Gas Light Co. v. U.S. Dep't. of Energy*, 666 F.2d 1359 (11th Cir. 1982).

The plaintiff in *Gillespie*, who was previously convicted of a domestic violence offense, lost his job as a police officer when Congress enacted the 1996 amendments to the Gun Control Act of 1968. Those amendments prohibit persons convicted of domestic violence offenses from possessing firearms in or affecting commerce, and effectively prevented the plaintiff from functioning as a police officer because he could not carry a gun. The plaintiff challenged the statute on several grounds, including the Tenth Amendment. Interestingly, the state government opposed the plaintiff's position. Although the Seventh Circuit affirmed the district court's dismissal of the plaintiff's complaint and stated that

it was "really the State's ox being gored" by the legislation, the Seventh Circuit held that the plaintiff had standing to pursue the Tenth Amendment claim because he alleged a concrete injury that was fairly traced to the legislation in question, and could be redressed by overturning the statute. *Gillespie*, 185 F.3d at 703.

Likewise, standing to assert Tenth Amendment claims existed in *Dillard* for intervenors who sought to challenge a remedial order issued by the district court under the Voting Rights Act that changed the size of a county commission and redrew district lines to create a majority African-American district. *Dillard*, 225 F.3d at 1276-77. Similarly, residents of a seniors-only housing complex had standing to challenge under the Tenth Amendment the amendments to the Fair Housing Act that prohibited housing discrimination against families with children. *Seniors Civil Liberties Assoc.*, 965 F.2d at 1034 n. 6 ("if injury or threatened injury exists, private parties have standing to assert Tenth Amendment challenges ...").

In *Atlanta Gas*, the plaintiff gas companies challenged the Fuel Use Act of 1978 and related regulations under the Tenth Amendment, claiming improper federal regulation of natural gas distribution, which plaintiffs maintained were "a subject of purely local concern historically left within the purview of state or municipal regulatory authority." *Atlanta Gas*, 666 F.2d at 1363. Although the plaintiffs were not states or government officials, the Eleventh Circuit granted standing. In so doing, the Eleventh Circuit cited the Supreme Court's practice of impliedly granting standing for private-party Tenth Amendment challenges during the New

Deal, and noted that the Supreme Court allowed standing for constitutional claims where the private plaintiffs "demonstrate the requisite injury in fact and causal relation to the action in question." *Id.*, 1368 n. 16.

Carol Bond's predicament presents a stronger case for standing than any of the plaintiffs in the Seventh and Eleventh Circuit cases. The government's contrary position reflects a misunderstanding that clings to New Deal dicta and fails to account for the more recent Seventh and Eleventh Circuit pronouncements that private parties, in appropriate situations, are proper champions of Tenth Amendment arguments. Indeed, when (as in this case) states either fail to act or are cut out of the equation entirely by federal government overreaching, sometimes private parties are the only potential litigants in a position to assert such arguments.[1] Justice O'Connor has noted that the Tenth Amendment is a vehicle that may be utilized by properly positioned individuals to protect their individual rights:

> The Constitution does not protect the sovereignty of States for the benefit of the

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[1] The government suggests that Bond cannot assert her Tenth Amendment challenge because the Commonwealth has not appeared in this action to express support for Bond's position. It is simply not realistic to expect the Commonwealth to appear in this case, and the government offers no evidence that it invited such participation. The government then suggests that the Commonwealth would support the government's unrestricted intrusion into state law enforcement domain because it would relieve the Commonwealth's criminal docket load. There is simply no evidence in the record to support this proposition.

> States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism ***secures to citizens*** the liberties that derive from the diffusion of sovereign power." ... Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials. ... The constitutional authority of Congress cannot be expanded by the "consent" of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States. State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution.

New York v. United States, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)) (emphasis added).

In this case, the federal government has embraced a position and rationale whereby it can enter and displace law enforcement functions traditionally reserved to the states by utilization of the Treaty Power. This is the antithesis of federalism expressed in the Tenth Amendment. Such overreaching should not go unchecked merely because the federal government directly enacted the statute at issue rather than commandeering state

authorities to do so via legislative or executive mandate, or merely because the Commonwealth of Pennsylvania has not appeared to oppose the action. Indeed, standing was appropriately found in *Gillespie* even when the state government opposed the plaintiff's position. Due to the Treaty Power mechanism selected by the federal government to enact the subject legislation, only Carol Bond is presently positioned to challenge the federal government's overreaching. Carol Bond is directly impacted by the federal government's actions, and has the most legitimate and direct of "stakes" in the resolution of her arguments. Carol Bond's arguments should be heard and considered on their merits.

IV. Conclusion

Carol Bond's predicament clearly presents a justiciable "case or controversy" under Article III of the Constitution. She is not some non-profit corporation or concerned citizens' group that is only tangentially impacted by the challenged legislation or that asserts only generalized grievances. Indeed, it is difficult to conceive of a more qualified scenario for private party standing to assert a Tenth Amendment violation than that presented by Carol Bond. Because the key passage of *Penn. Elec. Power* relied on by the government is only dicta, and because the Seventh and Eleventh Circuits offer a proper understanding of private party Tenth Amendment standing, Carol Bond respectfully requests that the Court adopt the approach of the Seventh and Eleventh Circuits and recognize her standing to challenge 18 U.S.C. § 229 and this prosecution under the Tenth Amendment.

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PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
DEC 3 - 2010
OFFICE OF THE CLERK

No. 09-1227

In the
Supreme Court of the United States

CAROL ANNE BOND,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Petitioner admitted that, after learning that her former best friend was pregnant with her husband's child, she spread toxic chemicals on the woman's car and mailbox, causing the woman to suffer a small chemical burn on her thumb. Instead of allowing local officials to handle this domestic dispute, the federal prosecutor indicted petitioner under a federal law, 18 U.S.C. § 229(a), enacted by Congress to implement the United States' treaty obligations under an international arms-control agreement that prohibits nation-states from producing, stockpiling, or using chemical weapons. Facing a sentence of six years in prison and five years of supervised release, petitioner challenged the statute and her resulting conviction as exceeding Congress's enumerated powers and impermissible under the Tenth Amendment. Declining to reach petitioner's constitutional arguments, the Third Circuit held that, when a State and its officers are not parties to the proceedings, a private party has no standing to challenge the federal statute under which she is convicted as in excess of Congress's enumerated powers and in violation of the Tenth Amendment.

The question presented is:

Whether a criminal defendant convicted under a federal statute has standing to challenge her conviction on grounds that, as applied to her, the statute is beyond the federal government's enumerated powers and inconsistent with the Tenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 581 F.3d 128, and reproduced at Pet. App. 1–24. The unpublished order of the court of appeals denying rehearing and rehearing en banc is reproduced at Pet. App. 25.

The district court's unpublished bench ruling, denying petitioner's motions to suppress and dismiss, is reproduced at Pet. App. 26–35.

JURISDICTION

The court of appeals rendered its decision on September 17, 2009, and denied a timely petition for rehearing and rehearing en banc on December 10, 2009. Pet. App. 25. On March 9, 2010, Justice Alito extended the time for filing a petition for certiorari to and including April 9, 2010. The petition was filed on April 9, 2010, and granted on October 12, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend X.

The legislative powers of Congress are enumerated in Article I, section 8 of the United

States Constitution, but do not include any general police power. *See* U.S. Const. art. I, § 8.

The relevant provisions of the Chemical Weapons Convention are reproduced at Pet. App. 37–42.

The relevant provisions of the implementing legislation for the Chemical Weapons Convention, codified at 18 U.S.C. §§ 229 *et seq.* and 22 U.S.C. §§ 6701 *et seq.*, and other relevant statutory provisions, are reproduced at App. 1a–9a.

STATEMENT OF THE CASE

This case presents the question whether a criminal defendant has standing to challenge her conviction under a federal statute on grounds that, as applied to her, the statute lies beyond Congress's enumerated powers and violates the Tenth Amendment. That issue arises here out of a domestic dispute that occurred when a married woman discovered that her closest friend was pregnant with her husband's child. That revelation prompted the wife to spread chemicals on her former friend's car door handles, front doorknob, and mailbox in an effort to harass and injure, but not kill, her husband's paramour. Instead of referring this domestic dispute to state or local law enforcement authorities, the United States Attorney decided that a federal prosecution, and a novel one at that, was in order and indicted petitioner on the remarkable theory that, because the assault involved chemicals, petitioner had violated a federal statute implementing the United States' treaty obligations under an international arms-control agreement.

A. The Underlying Domestic Dispute

Petitioner Carol Anne Bond is a 40-year-old woman who, until her incarceration, resided in the small borough of Lansdale, Pennsylvania, her home since 2001. Pet. App. 67. Lansdale is located about 28 miles northwest of Philadelphia and has a population of approximately 17,000 people.

Petitioner has been married to her husband, Clifford Bond, for more than 14 years, and they have an adopted child. Pet. App. 67. Before marrying, petitioner lived most of her life in Barbados, where she was raised by her mother. Pet. App. 66. When petitioner was a young child, her father had multiple affairs and fathered other children outside of marriage. *Id.* Petitioner's parents divorced when she was eleven, and she has not seen her father for more than 17 years. *Id.*

In 1995, petitioner moved with her mother and sister to the United States, where she became very close friends with Myrlinda Haynes, a woman who was also a Barbados native. Pet. App. 66, 68. Haynes owned a home in nearby Norristown, and petitioner came to consider and treat Haynes as a sister. Pet. App. 56, 69.

In 2006, Haynes announced that she was pregnant. Unable to bear a child of her own, petitioner was excited for her closest friend. Pet. App. 2. Her excitement did not last, however, for petitioner soon discovered that her own husband was the child's father. *Id.* This double betrayal brought back painful memories of her own father's infidelities and caused petitioner to suffer an emotional breakdown. She experienced an "intense

level of anxiety and depression," started to lose her hair, and suffered occasional panic attacks. Pet. App. 72–73.

In the midst of this emotional breakdown, petitioner became fixated on punishing Haynes for her betrayal. Pet. App. 48. Petitioner took a bottle of 10-cholo-10H-phenoxarsine (an arsenic-based chemical) from her employer, the chemical manufacturer Rohm & Haas, and she purchased a vial of potassium dichromate through Amazon.com from a photography equipment supplier. Pet. App. 2. Petitioner knew that the chemicals were irritants and believed that, if Haynes touched them, she would develop an uncomfortable rash. Pet. App. 58. Both chemicals are toxic and, if ingested or exposed to the skin at sufficiently high doses, can be lethal. Pet. App. 2 n.1.

According to the government, petitioner went to Haynes's home on several occasions between November 2006 and June 2007 and spread chemicals on Haynes's car door handle, mailbox, and apartment doorknob. Pet. App. 2. None of these attempted assaults was successful or sophisticated. *Id.* Haynes avoided harm because she noticed the easy-to-spot chemicals, except on one occasion when she sustained a small chemical burn on her thumb, which "required repeated rinsing with water." Pet. App. 54; *see also* Pet. App. 90 ("the victim felt a burning sensation after touching the one toxic chemical placed on her vehicle's door handle"). This one-time "burning sensation" is the *only* physical injury Haynes ever sustained. Pet. App. 54. The undisputed evidence shows that petitioner had no intent to kill Haynes. Pet. App. 57–58, 60–61.

When Haynes complained to the local police and postal inspection service, postal inspectors installed surveillance cameras in and around Haynes's home. Petitioner was later caught on tape opening Haynes's mailbox, stealing an envelope, and stuffing potassium dichromate inside the muffler of Haynes's car. Pet. App. 3. On June 7, 2007, postal inspectors arrested petitioner and executed search warrants on her house and car. In custody, petitioner signed a statement admitting that she had taken chemicals from Rohm & Haas. *Id.*

Petitioner's arrest shocked her friends and family, who believed that the attempted assaults were completely out of character. Pet. App. 68–72. A doctor who performed a mental health evaluation before sentencing concluded that petitioner was "not likely to recidivate." Pet. App. 73. In the doctor's view, petitioner had "committed the crimes [that] resulted in her arrest while suffering from a significantly reduced mental capacity." *Id.* According to the doctor, petitioner "knew what she was doing was wrong" but she was "unable to control behavior she knew was wrongful" due to an "intense level of anxiety and depression," a "response to learning that her husband and 'sister' (*e.g.*, Myrlinda Haynes) ha[d] betrayed her." *Id.*

B. The Federal Indictment

Domestic disputes resulting from marital infidelities and culminating in a thumb burn are appropriately handled by local law enforcement authorities. While there certainly would be a role for local prosecutors to exercise appropriate prosecutorial discretion, no one would dispute that petitioner's conduct likely violates one or more

Pennsylvania statutes, including statutes that criminalize simple assault, *see* 18 Pa. Cons. Stat. § 2701, aggravated assault, *see id.* § 2702, and harassment. *See id.* § 2709. Indeed, petitioner accepted full responsibility for her actions and was willing to plead guilty and face whatever punishment her community was prepared to mete out. Petitioner's defense counsel accordingly urged the federal authorities to transfer the case to local law enforcement for prosecution and punishment under state law. That request was denied.

An Assistant United States Attorney instead opted for a novel, heavy-handed approach—charging petitioner with violations of 18 U.S.C. § 229(a), a federal statute implementing the United States' obligations under the 1993 Chemical Weapons Convention. Pet. App. 37–42. The Convention—formally entitled the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction—is an international arms-control agreement among nation-states that outlaws the production, stockpiling, and use of chemical weapons. The Convention expressly "reaffirms" and "complement[s]" the Geneva Protocol of 1925, which prohibited the use in wartime of asphyxiating or poisonous gases and bacteriological weapons. Pet. App. 37. The treaty's objective is to move towards "complete disarmament under strict and effective international control" and the "elimination of all types of weapons of mass destruction." *Id.*

Article I sets out the core obligations of signatory states. State parties pledge that they will "never under any circumstances" use, develop, or

stockpile chemical weapons or engage in military preparations to use chemical weapons. Pet. App. 39. Each signatory also commits to destroying any existing chemical weapon stockpiles and submits to a strict regime of inspections to verify compliance. *Id.* Signatories likewise pledge not to employ riot control agents as a method of warfare. *Id.*

Article IV requires state parties to enact domestic legislation prohibiting persons in their territories from engaging in activities "prohibited to a State Party." Pet. App. 40–42. In particular, each signatory is required to extend penal legislation to cover the prohibited activities and to ensure the statute's extraterritorial application to the state's nationals even when they are abroad. *Id.* To avoid differences in interpretation, state parties are required to incorporate the Convention's definition of chemical weapons into national legislation. *See* International Committee of the Red Cross, *Fact Sheet: 1993 Chemical Weapons Convention* (2003), http://www.icrc.org/eng/assets/files/other/1993_chemical_weapons.pdf.

Urging the Senate to ratify the treaty, then-Secretary of State Madeleine Albright noted that the Convention would "make it less likely that our Armed Forces will ever again encounter chemical weapons on the battlefield, less likely that rogue states will have access to the material needed to build chemical arms, and less likely that such arms will fall into the hands of terrorists." 143 Cong. Rec. S3309-02 (daily ed. April 17, 1997). On April 24, 1997, days before the Convention entered into force, the United States Senate ratified the treaty by a vote of 74–26.

Congress then passed implementing legislation, providing statutory authority for domestic compliance with the Convention's provisions. *See* Pub. L. No. 105-277, 112 Stat. 2681-856 (1998); Executive Order 13128, 64 Fed. Reg. 34,702 (June 28, 1999); Chemical Weapons Convention Implementation Act of 1998, 22 U.S.C. §§ 6701–6771 (1997). The implementing legislation sets forth procedures for the seizure and destruction of contraband chemical weapons, included detailed record-keeping and reporting requirements, and provides certain protections for confidential business information. In penal legislation codified at 18 U.S.C. §§ 229 *et seq.*, Congress established criminal and civil penalties for statutory violations committed within the United States or by American citizens outside the United States. *See id.* § 229(c).

The statute's criminal provisions render it unlawful for any person "knowingly" to "develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." *Id.* § 229(a)(1). Section 229F incorporates the Convention's definition of "chemical weapons" as including: (1) "toxic chemicals" and reactants involved in their production, "*except where intended for a purpose not prohibited under this chapter*"; (2) "munitions or devices" designed to cause harm through toxic chemicals; and (3) "equipment" designed for use in connection with those munitions and devices. *Id.* § 229F(1)(A) (emphasis added). The statute broadly defines "toxic chemicals" to refer to "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or

animals." *Id.* § 229F(8)(A). And the statute defines "purposes not prohibited" to include "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity." *Id.* § 229F(7)(A).

The statute thus sweeps broadly to criminalize any conduct involving a toxic chemical, including widely available chemicals with commercial uses, when used for any non-peaceful purpose. Unlike other federal statutes that address assaults, section 229 includes no requirement that the alleged assault occur within the special jurisdiction of the United States, that the assault have an effect on interstate commerce, that the victim be a person or institution with recognized federal status, or that some other federal interest be involved. *See, e.g.*, 18 U.S.C. §§ 111–115, 1951, 2111, 2113, 2114.3, 2332a. The statute also includes no requirement that the government prove a federal interest as an element of the offense. Consistent with its intent to criminalize serious activities implicating a major international treaty, the statute carries substantial penalties and unusual restrictions, such as a prohibition on release pending appeal. *See id.* § 3143(b)(2); *id.* § 3142(f)(1)(A); *id.* § 2332b(g)(5)(B)(i) (referring to section 229 violations).

Petitioner's assault did not involve stockpiling chemical weapons, engaging in chemical warfare, or undertaking any of the activities prohibited to state signatories under the Chemical Weapons Convention. Nonetheless, the Assistant United States Attorney prosecuted petitioner under 18 U.S.C. § 229. On September 5, 2007, a grand jury in the Eastern District of Pennsylvania returned an

indictment charging petitioner with two counts of having "knowingly acquired, transferred, received, retained, possessed and used a chemical weapon." JA 14. Potassium dichromate and 10-cholo-10H-phenoxarsine, the indictment explained, were "toxic chemical[s] as defined under 18 U.S.C. § 229F(1)(A) and (8)(A)" and "not intended by defendant Bond to be used for a peaceful purpose." JA 13–14. In addition, the indictment charged petitioner with two counts of mail theft in violation of 18 U.S.C. § 1708. JA 15.

C. The Proceedings Below

Before the U.S. District Court for the Eastern District of Pennsylvania, petitioner moved to suppress certain evidence and to dismiss the two chemical weapons counts under 18 U.S.C. § 229(a)(1). Petitioner argued that the statute, as applied to her, exceeded the federal government's enumerated powers, violated bedrock federalism principles guaranteed under the Tenth Amendment, and impermissibly criminalized conduct that lacked any nexus to a legitimate federal interest. Pet. App. 7. In addition, petitioner argued that the statute should be struck down as unconstitutionally vague and that the affidavits used to support the search warrants failed to establish probable cause. *See* Pet. App. 4, 7.

On November 19, 2007, the district court denied petitioner's motions in rulings from the bench. Pet. App. 36. The district court accepted the government's contention that 18 U.S.C. § 229 "was enacted by Congress and signed by the President under the necessary and proper clause of the Constitution ... [t]o comply with the provisions of a

treaty" and therefore did not contravene principles of federalism. Pet. App. 28. The district court also ruled that the statute was not impermissibly vague, and held that the search warrants were properly issued. Pet. App. 28–30.

On December 5, 2007, petitioner pleaded guilty to all four counts of the indictment but reserved her right to appeal the denials of her motions to dismiss and suppress. Pet. App. 46–47. The government requested a sentencing enhancement on grounds that, although petitioner was only a low-level technician at Rohm & Haas, she had used a "special skill" in selecting chemicals that were toxic through topical exposure. Petitioner's counsel objected, noting that the statute was "directed at the war on terrorism and dangerous rogue states, groups, and individuals" and thus the sentencing "guideline is really directed at conduct far different from that of Ms. Bond." Bond CA3 Sentencing Mem. 1, 10 (May 30, 2008). The district court nonetheless granted the government's requested enhancement and sentenced petitioner to six years in prison, with five years of supervised release, and ordered her to pay a $2,000 fine and restitution in an amount of $9,902.79. Pet. App. 5. Moreover, because petitioner was convicted under the chemical weapons statute, she was ineligible for release pending appeal. *See* 18 U.S.C. § 3143(b)(2); *id.* § 3142(f)(1)(A); *id.* § 2332b(g)(5)(B)(i) (referring to violations of 18 U.S.C. § 229). By comparison, had petitioner been convicted under state law for aggravated assault, she likely would have faced a prison sentence of 3–25 months. *See* 18 Pa. Cons. Stat. § 2702(a)(4); 204 Pa. Code § 303.13. And had she been convicted under federal law of mail theft

alone, her guideline range for imprisonment would likely have been 0–6 months rather than 70–87 months. *See* Pet. App. 58–82; U.S.S.G. §§ 2B1.1, 5A (2007).

Petitioner filed a timely appeal with the U.S. Court of Appeals for the Third Circuit. Pet. App. 1. On appeal, petitioner reiterated her constitutional objections, arguing that the application of 18 U.S.C. § 229 reflected a "massive and unjustifiable expansion of federal law enforcement into [a] state-regulated domain." Bond CA3 Br. 10–11. As petitioner explained, Congress should not be permitted to "[u]tiliz[e] the Treaty Power to create plenary federal criminal jurisdiction over conduct that federal law enforcement could not otherwise reach." *Id.* at 18.

On August 14, 2009, after briefing and oral argument, the Third Circuit issued a letter *sua sponte* requesting supplemental briefing on a question that had never been raised or argued by any party: "Does appellant, Carol Bond, have standing to assert that 18 U.S.C. § 229 encroaches on state sovereignty in violation of the Tenth Amendment to the United States Constitution absent the involvement of a state or its instrumentalities?" JA 17–18. In response, the government invoked, for the first time, this Court's decision in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939), and argued that petitioner lacked standing.

On September 17, 2009, the Third Circuit issued its decision. The court of appeals recognized that petitioner's Tenth Amendment claim raised important issues concerning the scope of Congress's

authority under the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 2, to effectuate the federal treaty power. Pet. App. 9–10. Describing the question as an issue of first impression, the Third Circuit acknowledged that it was unclear how far treaty-implementing legislation may intrude into areas over which the States possess primary authority. *See id.* (citing *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)). The court of appeals also recognized that petitioner's Tenth Amendment claim would require the court to "wade into the debate over the scope and persuasiveness of" this Court's 1920 decision in *Missouri v. Holland*, 252 U.S. 416 (1920). Pet. App. 10. It noted the "significant scholarly debate" over whether *Holland* was correctly decided and "mounting interest for reconsideration of the rationale for *Holland*'s holding." Pet. App. 10 & n. 4.

The Third Circuit ultimately declined, however, to address the merits of petitioner's constitutional arguments. Instead, it reached the startling conclusion that a criminal defendant convicted under a federal statute lacks standing to challenge that statute as beyond Congress's power to enact or otherwise inconsistent with the Tenth Amendment "absent the involvement of a state or its officers as a party or parties" to the litigation. Pet. App. 14. In reaching this counterintuitive conclusion, the Third Circuit deemed itself bound by this Court's decision in *Tennessee Electric*. In the Third Circuit's view, the "holding of *Tennessee Electric*" directly applies to the facts of petitioner's case and is therefore "binding irrespective" of the Court's more recent precedents. Pet. App. 15.

Petitioner filed a petition for certiorari to this Court on April 9, 2010. In response, the United States confessed error, "agree[ing]" that a "criminal defendant has standing to defend herself by arguing that the statute under which she is being prosecuted was beyond Congress's Article I authority to enact." U.S. Resp. Br. 6. The United States acknowledged that the Third Circuit's contrary conclusion, which the United States had helped procure through its supplemental brief, was erroneous. On October 12, 2010, the Court granted plenary review and subsequently appointed an *amicus* to defend the court of appeals' judgment.

INTRODUCTION AND SUMMARY OF ARGUMENT

This may be one of the easiest standing cases to reach this Court in some time. Applying the Court's by-now familiar tripartite test for standing, petitioner's standing is unassailable. She is not asserting standing as a taxpayer or as a would-be viewer of endangered flora or fauna, but as a resident of a federal penitentiary who asserts that the statute that brought her there cannot constitutionally be applied to her conduct. She is not asserting an abstract or generalized grievance, but the most concrete and particularized objection imaginable: She should not be locked in federal prison for six years, with five years of supervised release, based on an unconstitutional statute. There can be no dispute that petitioner's deprivation of liberty is directly traceable to her federal conviction, and that a ruling in her favor would redress that injury. Her standing is clear under this Court's

well-settled precedents. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

This case comes to the Court only because the court below applied a special standing rule for Tenth Amendment claims that it believed was compelled by this Court's precedent. Based on a single sentence in this Court's 1939 decision in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939), the Third Circuit held that a private party lacks standing to pursue a Tenth Amendment challenge "absent the involvement of a state or its officers as a party or parties" to the litigation. Pet. App. 14.

It is not clear that *Tennessee Electric* ever stood for that counterintuitive proposition. In context, the Court appears to have rejected a special rule *favoring* Tenth Amendment challenges, rather than to have adopted a rule distinctly *disfavoring* such challenges. Moreover, it is unclear whether the critical sentence is holding or dictum. And in all events, the decision does not survive this Court's abandonment of the "legal interest" test for standing on which the opinion as a whole is based.

More broadly, the rule embraced by the decision below is contrary to the entire sweep of the Court's modern standing and federalism jurisprudence. It also fails the test of common sense. The notion that the State that could have prosecuted the individual under its police power—but not the incarcerated individual—has standing to challenge the federal statute borders on the absurd. Whether or not it was ever binding or correct, the time has now come for this Court to inter *Tennessee Electric*'s

troublesome language and make clear that it is no longer good law.

In its place, this Court should decline the government's invitation to save half of a bad idea and adopt a special rule that would attempt to distinguish between state-sovereignty-oriented Tenth Amendment claims and claims based on the scope of Congress's Article I authority. Instead, the Court should reaffirm that the ordinary principles of standing apply to Tenth Amendment claims no differently from any other constitutional or statutory claim. There may be Tenth Amendment claims that are too abstract or generalized to be the basis for an Article III case or controversy. But the same rules that root out overly abstract and general claims under all manner of legal theories—from the First Amendment to the Endangered Species Act—are more than up to the task in the Tenth Amendment context. Applying those ordinary rules, this is an easy case: Petitioner has standing to contend that the federal statute under which she is currently being deprived of her liberty violates the Tenth Amendment and exceeds Congress's enumerated powers.

ARGUMENT

I. Ordinary Principles of Standing Apply To Tenth Amendment Claims Challenging A Federal Statute As In Excess Of Congress's Enumerated Powers.

Because petitioner plainly and indisputably satisfies the ordinary requirements for constitutional and prudential standing, there should be no impediment to her challenging her conviction

under a federal statute that, as applied to her, exceeds Congress's enumerated powers. The lower court's attempt to engraft additional standing requirements solely because she is advancing a Tenth Amendment claim cannot be squared with either the modern understanding of standing or the essential liberty-protecting safeguards embodied in the Constitution.

A. There Is No Legal Basis For Applying Special Standing Rules To Tenth Amendment Challenges.

Instead of applying traditional standing requirements, the Third Circuit invoked this Court's 71-year-old decision in *Tennessee Electric* as binding and controlling authority. Pet. App. 15 (citing *Rodriguez de Quijas v. Shearson*, 490 U.S. 477 (1989)). According to the court of appeals, *Tennessee Electric* holds that a private party lacks standing to challenge a federal statute under the Tenth Amendment unless the State or its officials participate in the litigation. But that interpretation misreads *Tennessee Electric* and, in any event, cannot be reconciled with this Court's more recent precedents.

1. In *Tennessee Electric*, local public utilities sought to enjoin the Tennessee Valley Authority ("TVA"), an instrumentality of the federal government, from competing against them in the sale of electricity. 306 U.S. at 136. The utilities asserted claims under the Fifth, Ninth, and Tenth Amendments, and the injuries they asserted were from competition introduced by the newly created TVA. *Id.* The Court looked at those asserted injuries with skepticism because, even if there were

a legal problem with the statute that authorized the TVA's competing activities, the competition itself was not unlawful (*e.g.*, in violation of the antitrust laws). In doing so, the Court applied the long-since-repudiated "legal interest" test for standing and held that even directly injured individuals do not have standing unless "the right invaded is a *legal right*—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Id.* at 137 (emphasis added); *see also Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153–54 (1970) (recognizing Article III standing for injured competitors and distinguishing *Tennessee Electric* as a product of the "legal interest" test). Stressing that there is nothing "illegal" about the TVA's competition, the Court dismissed all of the utilities' claims, whether based on the Fifth, Ninth, or Tenth Amendments, as "*damnum absque injuria*." 306 U.S. at 137–38, 140.

The Court then, somewhat puzzlingly, went on to consider the Ninth and Tenth Amendment claims separately, which were "said to rest" on a "distinct ground" of standing. *Id.* at 143. The Court first rejected those claims on the merits. *See id.* at 144 ("The sale of government property in competition with others is not a violation of the Tenth Amendment."). The Court then added a final confounding sentence addressing standing. That order of proceeding is jarring to the modern eye, which is used to seeing jurisdictional issues addressed before the merits. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). But that order of proceeding was likely a product of the tendency of the "legal interest" test to

conflate standing and the merits. In all events, that sentence is far from a model of clarity. It reads in its entirety: "As we have seen there is no objection to the [TVA's] operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] amendment." *Tenn. Elec.*, 306 U.S. at 144.

That single sentence has confounded courts and commentators ever since. It is not clear that any of the standing analysis in *Tennessee Electric* survives the abandonment of the then-current "legal interest" test for standing. *See infra* 22–27. Nor read in context is it clear that the passage imposes a special *disability* on Tenth (and Ninth) Amendment claims, so much as it rejects a special rule *favoring* Tenth (and Ninth) Amendment claims that would allow them to proceed under circumstances where other claims (like the Fifth Amendment claim) could not go forward under the prevailing standing principles of the day. Finally, it is not clear whether this puzzling sentence was "essential to" the holding and "thus binding," *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 234–35 (2d Cir. 2006), or merely "confusing dicta" that has clearly been overtaken by subsequent decisions. Ara B. Gershengorn, Note, *Private Party Standing to Raise Tenth Amendment Commandeering Challenges*, 100 Colum. L. Rev. 1065, 1073 (2000).

When read in the context of the opinion as a whole, the better view is that the Court applied its general "legal interest" test to all of the constitutional claims and then simply rejected the argument that, at least absent state participation,

there would be any special rule allowing the Ninth and Tenth Amendment claims to go forward when the Fifth Amendment claims would not. There is certainly little reason to read that one sentence as inflicting special disabilities on Tenth Amendment claims. And there is absolutely no reason to assume that the Court intended to preclude criminal defendants from challenging the constitutionality of federal statutes under which they are convicted.[1] Instead, the puzzling sentence is of a piece with the Court's general hostility to the utilities' effort to recover their injuries from competition, when the competition itself—as opposed to the legal authority of the would-be competitor—was in no way unlawful.

Contemporaneous Supreme Court decisions likewise suggest that the Court did not intend to impose a broad new constitutional rule of standing for Tenth Amendment claims in such a backhanded and understated way. This Court, no less than Congress, should not be presumed to "hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). Only two years earlier, in 1937, the Court confronted two separate, private-party Tenth Amendment challenges to the federal Social Security Act, addressing whether the federal program unduly

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[1] Even under the old, discarded "legal interest" test, it is far from clear that a court would have deemed a conviction or prison time "*damnum absque injuria*" or otherwise have applied the "legal interest" test to deny standing to an individual seeking to challenge her conviction.

interfered with state unemployment compensation schemes, *see Steward Machine Co. v. Davis*, 301 U.S. 548, 585 (1937), and whether it exceeded Congress's power to spend for the general welfare. *See Helvering v. Davis*, 301 U.S. 619, 640 (1937). Although in both cases the state and federal defendants, both of whom defended the federal program as constitutional, questioned the private parties' standing to challenge the program, the Court resolved the Tenth Amendment claim on the merits without suggesting that there was any special standing rule that applied to private-party Tenth Amendment claims. *See Atlanta Gas Light Co. v. U.S. Dep't. of Energy*, 666 F.2d 1359, 1368 n.16 (11th Cir. 1982). If the Court meant to adopt a broad new rule that cast doubt on those two recent rulings, it could have been expected to say as much.

2. Although *Tennessee Electric*'s single-sentence statement can and should be construed narrowly and some lower courts have done so, the more prudent course for this Court is to inter that part of the decision once and for all. *Cf. Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007) (repudiating language in prior opinion that had "puzzled the profession" long enough). The single sentence is not entitled to any *stare decisis* respect because there are no relevant reliance interests, *see Dickerson v. United States*, 530 U.S. 428, 442 (2000), and that portion of the decision is neither supported by reasoning nor workable in practice, as evidenced by the difficulty lower courts have had understanding and applying it. *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion). Perhaps most importantly, whatever doctrinal underpinnings may have existed for *Tennessee*

Electric's single-sentence gloss on then-accepted standing doctrine, they have been wholly undermined and eroded by subsequent precedent. *See Leegin Creative Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 900 (2007) (citing *Dickerson*, 530 U.S. at 443; *State Oil Co. v. Kahn*, 522 U.S. 3, 21 (1997)). In particular, any suggestion that private citizens lack standing to assert the liberty-protecting structural guarantees embodied in the Tenth Amendment has long since been overtaken by developments in this Court's standing and Tenth Amendment jurisprudence.

First, as noted above, this Court has long since abandoned the "legal interest" test of standing in favor of the modern tripartite focus on injury-in-fact, traceability, and redressability. *See Camp*, 397 U.S. at 153–54; *Federation for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 907 n.6 (D.C. Cir. 1996) (*Tennessee Electric*'s "legal-interest test" was "laid to rest by the Supreme Court in 1970"). A special rule that only States can pursue Tenth Amendment claims cannot survive that jurisprudential change. *See Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (precedent not entitled to *stare decisis* effect when it is "no more than a remnant of abandoned doctrine"). As the Court explained in *Camp*, the "legal interest" test conflated the merits and standing questions in a way that meant that only certain parties could bring only certain claims based on only certain injuries. 397 U.S. at 153. Under that now-defunct test, the disgruntled utilities in *Tennessee Electric* might have had a legally protected interest in recovering for their competitive injuries if they were bringing an unfair competition

claim, but not for constitutional claims that did not challenge the legality of the competition as such.

Modern standing doctrine has abandoned that approach. *Camp* squarely overruled the "legal interest" test, *id.* at 153-54, and *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), explicitly rejected the suggestion that private parties must demonstrate an abstract nexus between an injury that establishes standing and the nature of the constitutional right asserted. *Id.* at 79, 98. What matters now is whether there is an injury-in-fact that is fairly traceable to the allegedly unlawful government action and would be redressed by a favorable decision. *See Lujan*, 504 U.S. at 560. Those requirements are self-evidently satisfied here where the injury-in-fact is a deprivation of liberty that could hardly be more directly traceable to the questioned federal statute and where redressability is straightforward. *See Diamond v. Charles*, 476 U.S. 54, 64 (1986) ("conflict between [government] officials empowered to enforce a law and private parties subject to prosecution under that law is a classic 'case' or 'controversy' within the meaning of Art. III").

To the extent there remains an inquiry into whether the plaintiffs' injuries are to the kind of interests the law seeks to protect, or whether the plaintiffs are the proper plaintiffs to bring their claims, that is addressed by the prudential "zone-of-interests" test. *See Capital Legal Found. v. Commodity Credit Corp.*, 711 F.2d 253, 258 (D.C. Cir. 1983) (legal interest test "had currency at one time ... but it has been replaced by the more expansive 'zone of interests' test"). And petitioner's

claim falls comfortably within the zone-of-interests of Tenth Amendment protection. *See New York v. United States*, 505 U.S. 144, 181 (1992); *cf. Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987) (zone-of-interest test may not apply to *ultra vires* challenges).

Second, conceptions of the Tenth Amendment's proper role in the constitutional structure have changed just as dramatically over the past seven decades. *Tennessee Electric* was decided in 1939, in an era when the court was removing all manner of judicial obstacles to the assertion of federal power over areas that were traditionally the exclusive province of the States. This is the same era in which the Court decided *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), *United States v. Darby*, 312 U.S. 100 (1941), and *Wickard v. Filburn*, 317 U.S. 111 (1942). The combined effect of these decisions caused many to conclude that there were no judicially-enforceable limits on federal power and to dismiss the Tenth Amendment as nothing more than "a truism." *Darby*, 312 U.S. at 124; *see also* Paul D. Moreno, *"So Long As Our System Shall Exist": Myth, History, and the New Federalism*, 14 Wm. & Mary Bill Rts. J. 711, 739 (2005) ("With all economic activity understood as 'commerce,' the truism became a dead letter."). Indeed, in the wake of these decisions, it was widely understood that limits on the scope of the federal government would have to be enforced by the States politically, rather than by the People or the States through litigation. *See, e.g.*, Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 Yale L. J. 1552 (1977).

That view has changed in more recent decades, as the Court has vindicated both the Tenth Amendment and limits on Congress's enumerated powers. Importantly, that reassertion of the constitutional limits on federal power has come in significant part through suits brought by aggrieved individuals without a mention of *Tennessee Electric* or any other limit on the ability of individuals to assert the essential structural guarantees of the Constitution to protect their individual interests.

In particular, the Court has reasserted the critical role of judicial review in addressing the proper balance of authority between federal and state government to ensure that all levels of government represent and remain accountable to the People. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 920–21 (1997); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Reflecting "one of the Constitution's structural protections of liberty," the Tenth Amendment thus serves to "reduce the risk of tyranny and abuse" from either the States or the federal government. *Gregory*, 501 U.S. at 458.

In *New York v. United States*, the Court addressed the Tenth Amendment's substantive role in greater detail, holding that a statutory radioactive waste "take title" provision violated the Tenth Amendment because it "commandeered" States into either taking ownership of the waste or implementing the legislation. 505 U.S. at 181–82. As the Court explained, the Tenth Amendment is not designed to "protect the sovereignty of the States for the benefit of the States or state governments as abstract political entities." *Id.* at 181. Instead, the Tenth Amendment exists "for the protection of

individuals." *Id.*; *see also* The Federalist No. 51 at 323 (James Madison) (Clinton Rossiter ed., 1961) ("power surrendered by the people is first divided between two distinct governments and ... [h]ence a double security arises to the rights of the people"). Accordingly, "[w]here Congress exceeds its authority relative to the States ... the departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *New York*, 505 U.S. at 182 (the "constitutional authority of Congress cannot be expanded by the 'consent' of the government unit whose domain is thereby narrowed"). As with the division of powers among the three coordinate branches of government, the "separation of powers does not depend on ... whether 'the encroached-upon branch approves the encroachment.'" *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010) (quoting *New York*, 505 U.S. at 182).

The bedrock constitutional principles recognized in *New York* have been reaffirmed in other decisions. In 1995, for the first time since the era of *Tennessee Electric*, the Court imposed limits on Congress's legislative powers under the Commerce Clause. *See United States v. Lopez*, 514 U.S. 549, 567–68 (1995); *id.* at 589 (Thomas, J., concurring) (expressing concern that broad "construction[s] of the scope of congressional authority ... com[e] close to turning the Tenth Amendment on its head"); *see also United States v. Morrison*, 529 U.S. 598, 617 (2000). And in 1998, the Court invoked *New York* in *Printz v. United States* to strike down, on Tenth Amendment grounds, a federal law that required local police chiefs to support federal regulation of handgun sales

by administering background checks. 521 U.S. at 919.

This Court's modern jurisprudence, consistent with constitutional requirements, thus views the Tenth Amendment as designed to protect individuals and as a substantive check on Congress's exercise of legislative power. It also views standing as governed by basic requirements of injury-in-fact, traceability, and redressability, without requiring an affront to the plaintiff's "legally-protected interest" or any special rules disfavoring particular legal theories. These significant jurisprudential developments render the Court's single sentence in *Tennessee Electric* a complete anachronism. That sentence has "puzzled the profession" for more than "50 years" and it has "earned its retirement" once and for all. *Twombly*, 550 U.S. at 563.

B. The Court Should Not Create Any Other Special Rule For Tenth Amendment Claims.

This Court should not attempt to salvage *Tennessee Electric* or a portion of it by accepting the government's invitation to draw an arbitrary distinction between different types of Tenth Amendment claims. At the petition stage, the government posited that private parties should have standing to bring claims challenging statutes as exceeding Congress's enumerated Article I powers but should *not* have standing, absent state participation, to bring claims challenging commandeering-type intrusions into state sovereignty or dignity. *See* U.S. Resp. Br. 6. There is no need or basis for this distinction.

Ordinary principles of standing are perfectly adequate to eliminate truly abstract or generalized grievances, no matter what the statutory or constitutional provision invoked. No matter what the legal theory—Tenth Amendment or otherwise—a plaintiff who raises "only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 601 (2007) (plurality opinion) (quoting *Lujan*, 504 U.S. at 573–74); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006). There is no reason for a special rule for the Tenth Amendment, especially given the confusion that *Tennessee Electric* has sown.

Indeed, if, as the government suggests, the "confusion over the meaning of" *Tennessee Electric* truly boils down to the fact that "the 'Tenth Amendment' label [is] now applied to both types of claims," U.S. Resp. Br. 9, the government has thus far been among the only ones to recognize that. The distinction has not been acknowledged, much less relied on, by any of the lower courts in their standing decisions. *See* Pet. Reply 7–8. Leaving *Tennessee Electric* intact for one category of Tenth Amendment claims would thus not resolve the fundamental confusion that has plagued the lower courts.

More fundamentally, a bifurcated legal test could generate new uncertainties by engrafting a

needless threshold inquiry about the nature of the Tenth Amendment claim. The exact boundaries that divide "enumerated powers" claims from "commandeering" claims are far from self-evident or self-executing. Nor can a bifurcated legal test be squared with *New York*, which took pains to disavow any meaningful distinction between an "enumerated powers" claim and a "commandeering" claim. This Court concluded that "*[w]hether* one views the take title provision as lying outside Congress's enumerated powers, *or* as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the" Tenth Amendment. 505 U.S. at 177 (emphases added). *New York* itself involved a "commandeering" claim, and *New York* emphasized that the Tenth Amendment did not exist just for the benefit of States, but to protect individual liberty as well.

Accordingly, rather than tackle the problems created by the existing line of inquiry by superimposing an additional line of inquiry atop the faulty edifice, the Court should take this opportunity to inter *Tennessee Electric* altogether and establish that Tenth Amendment claims of every stripe are subject to ordinary standing rules. That approach has the benefit of being clear and administrable and of harmonizing Tenth Amendment standing with the broader fabric of this Court's standing jurisprudence.

II. The Decision Below Would Vitiate Vital Checks On Federal Overreaching And Leave Important Questions Unaddressed.

When a private party challenges a statute as being beyond Congress's enumerated powers, the party not only appropriately seeks redress for his or her individual injury, but also reinforces the proper constitutional allocation of powers between the federal and state systems. Private-party suits thus not only vindicate individual liberty interests but also serve as a vital constitutional check on federal incursions into the state domain that States may lack the incentive or resources to challenge themselves.

A. States Often Lack The Resources Or Will To Challenge Federal Encroachment On State Interests.

The decision below erroneously assumes that where the federal government has intruded on state sovereign interests, the State can be relied on to object. In its view, the State's participation is critical because it gives credence to the claim that there has been a Tenth Amendment violation. In fact, as this Court has recognized, the "interests of public officials ... may not coincide with the Constitution's intergovernmental allocation of authority." *New York*, 505 U.S. at 183; *see also Printz*, 521 U.S. at 936 (O'Connor, J., concurring); *cf. Free Enter. Fund*, 130 S. Ct. at 3155 (correcting an intrusion into the President's removal authority to which the executive branch did not object).

1. For a host of reasons, state officials can and do opt to enforce potentially unconstitutional federal

laws. For example, States with strapped budgets and short staff may not be aware of the constitutional concerns, or wish to "conserve resources," or prefer to "avoid antagonizing the federal government." Gershengorn, 100 Colum. L. Rev. at 1066. Similarly, States have few incentives to object to federal laws that relieve them of responsibilities or accountability for difficult decisions. For instance, States may well acknowledge that "'preventing and dealing with crime is ... the business of the States,'" *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (citation omitted), but be more than happy for the federal government to assume those often-costly duties. Similarly, state officials might "approve of" encroaching federal legislation because they do "not want to face the political ramifications of enacting the statutory scheme themselves." Gershengorn, 100 Colum. L. Rev. at 1067. In all these situations, "[w]here state officials purport to submit to the direction of Congress" because it permits them to shift responsibility or otherwise furthers their interests, "federalism is hardly being advanced." *New York*, 505 U.S. at 183.

2. Just as courts should not overestimate the extent to which States' interests "coincide with the Constitution's intergovernmental allocation of authority," *id.*, courts also should not overestimate the extent to which States' interests coincide with the interests of their citizens. The Third Circuit suggested that "the State represents the interests of its citizens in general" and that individuals opposed to their "'state's policy of acquiescence'" to a federal encroachment may change that policy through "local political processes." Pet. App. 16 n.8 (quoting

Medeiros v. Vincent, 431 F.3d 25, 35 (1st Cir. 2005)). But it is one thing to ask States to fashion reasonable policies to address local concerns and another thing to expect local governments to object to the federal government solving those problems for them. The Constitution protects individual liberty by limiting the federal government to its enumerated powers and giving a citizen a fair chance to influence policy at the state or local level. The Constitution does not put a unique burden on citizens to force the State to object to federal overreaching.

More broadly, the Third Circuit's blithe view underestimates the extent to which the incentives of States and private parties can diverge. Because States often willingly (and even enthusiastically) "submit to the direction of Congress" even when the government exceeds its enumerated powers, many private parties find that local democratic processes offer little comfort as a realistic and practical matter.

That is nowhere more true than in cases where the federal government's Tenth Amendment violation directly and concretely injures a single individual. Notwithstanding the manifest incongruence between petitioner's conduct and her conviction under a federal statute enacted to implement the United States' treaty obligations under the Chemical Weapons Convention, it would be unrealistic to expect a State or even fellow citizens to rise up to challenge the constitutionality of petitioner's conviction. However intrusively the treaty-implementing legislation might sweep in matters traditionally handled by local officials under

state law, neither the State nor its officials are likely to join petitioner's constitutional challenge where the most concrete and tangible stakes of a suit would pertain to only one woman's conviction.

B. Checks On Federal Overreach Are Especially Critical In Matters Of Criminal Prosecution.

Maintaining the federal-state balance takes on heightened importance and sensitivity where (as here) criminal law enforcement authority is concerned. In *Patterson v. New York*, 432 U.S. 197 (1977), this Court noted that "preventing and dealing with crime is much more the business of the States than it is of the Federal government." *Id.* at 201. The Framers envisioned that the ordinary administration of "private justice between the citizens of the same State" would fall within the "province of the State governments." The Federalist No. 17, at 118 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Under that system "devised by our founders and maintained until recently, federal prosecutors [did] not s[eek] to displace the state systems of criminal justice in routine cases." *United States v. Crawford*, 982 F.2d 199, 205 (6th Cir. 1993) (Merritt, C.J., concurring).

1. In recent decades, however, the rampant federalization of traditional state and local crimes has upended the federal-state balance. In a seminal 1998 report, the American Bar Association's Task Force on Federalization of Criminal Law estimated that a staggering 40% of the thousands of federal crimes were created *after 1970*. *See* ABA, Report on the Federalization of Criminal Law (1998); *see also* Edwin Meese, III, *Big Brother on the Beat: The*

Expanding Federalization of Crime, 1 Tex. Rev. L. & Pol. 1, 3 (1997); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1173 (1995). As then-Senator Joseph Biden lamented, Congress "federalize[s] everything that walks, talks, and moves." Edwin Meese III, *The Dangerous Federalization of Crime*, Wall St. J., Feb. 22, 1999.

Significantly, the majority of new federal crimes seek to prosecute conduct that is simultaneously subject to prosecution under state laws that have been on the books for years. *Cf. Lopez*, 514 U.S. at 551. Federal laws notably extend even to routine drug and firearms offenses and garden-variety infractions like carjacking. *See* 18 U.S.C. § 2119. And where "Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *Lopez*, 514 U.S. at 561 n.3 (quoting *United States v. Enmons*, 410 U.S. 396, 411–12 (1973)).

The federalization trend has also taken an administrative toll on the federal judicial system. In response to swelling federal criminal dockets, the Judicial Conference of the United States urged in its 1995 Long Range Plan that "criminal jurisdiction should be assigned to the federal courts only to further clearly defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters." Judicial Conference of the United States, Long Range Plan for the Federal Courts (1995), *reprinted in* 166 F.R.D. 49, 83 (1995). To that end, the plan narrowly set forth five types of crimes appropriate

for federal enforcement: (1) offenses against the federal government or its inherent interests; (2) criminal activity with substantial multi-state or international aspects; (3) criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise; (4) serious high-level or widespread state or local government corruption; and (5) criminal cases raising highly sensitive local issues viewed as more objectively prosecuted in the federal system. *Id.* at 84–85.

Cognizant of such concerns, this Court has resisted the federal assumption of plenary police power in areas that have traditionally and historically fallen under state or local control. In *Lopez*, this Court invalidated a statute that made it a federal crime to possess a firearm within 1,000 feet of a school. In holding that the statute exceeded Congress's power to regulate commerce, the "Court stressed that the area was one of traditional state concern." *Jones v. United States*, 529 U.S. 848, 858 (2000); *see also Lopez*, 514 U.S. at 561 n.3; *id.* at 564; *id.* at 577 (Kennedy, J., concurring). That decision later informed the Court's reasoning in *Jones*, in which it declined to read a federal statute "as encompassing the arson of an owner-occupied private home." 529 U.S. at 858. The Court explained that, in light of the "concerns brought to the fore in *Lopez*," the statute should be read to avoid "render[ing] the 'traditionally local criminal conduct' in which petitioner Jones engaged 'a matter for federal enforcement,'" lest it "'change[] the federal-state balance.'" *Id.*; *see also Morrison*, 529 U.S. at 636 n.10 (2000) (Souter, J., dissenting) ("I and other Members of this Court appearing before

Congress have repeatedly argued against the federalization of traditional state crimes and the extension of federal remedies to problems for which the States have historically taken responsibility and may deal with today if they have the will to do so.").

The fact that this Court has been willing to apply rules of construction and constitutional avoidance principles in cases like *Jones* underscores the oddity of precluding a defendant from raising the Tenth Amendment issue itself. A criminal defendant surely has standing to urge a narrow construction of a statute to avoid a Tenth Amendment problem or even grave doubts about a problem. It makes little sense not to allow the defendant to raise the problem itself squarely.

2. The growing overlap of federal and state criminal laws also promotes sentencing disparities among defendants and abuses of prosecutorial "discretion." A wide spectrum of criminal conduct is now potentially subject to either federal or state prosecution. The choice between the two, however, can generate dramatically different results. Offenders often fare significantly worse under a federal-law prosecution than under a state-law prosecution for identical conduct. "If convicted, a federally prosecuted defendant is likely to receive a longer sentence and to serve far more of that sentence than he would if sentenced in state court." Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643, 647–48 (1997); *see also id.* at 668 (disparities "are most striking in cases involving frequently charged duplicative federal statutes, like drug and firearms prosecutions"). Many federal laws,

moreover, allow greater maximum sentences than their state law analogs and trigger harsh statutory minimum sentences that exceed the maximum permitted under state law. *See id.* at 674. Accordingly, even "routine street crime cases ... are brought in federal court in order to insure longer sentences ... and mandatory minimum sentenc[es]." *Crawford*, 982 F.2d at 206 (Merritt, C.J., concurring).

This case is a dramatic illustration of the gross disparity between local and federal prosecution. Conduct that might have merited a modest sentence under Pennsylvania law was greeted with the kind of stiff sentence that one would expect for the use of a true chemical weapon. And, of course, the consequential nature of the choice between federal and state prosecution means that federal prosecutors have assumed enormous and essentially unreviewable power to charge quintessentially local offenses in vastly disparate ways. This case is a stunning illustration of the truth that prosecutorial discretion is not always wisely exercised.

C. The Third Circuit's Approach Would Leave Important Constitutional Questions Unanswered.

1. The vital check of private-party suits not only helps to maintain the constitutionally mandated division of federal-state powers, but serves more practical purposes—generating doctrinal guidance and ensuring the full airing of important questions of law before the courts. Petitioner's challenge to 18 U.S.C. § 229 exemplifies the often thorny and unsettling issues about the constitutional reach of federal statutes that would go

unaddressed under the Third Circuit's cramped approach to private-party standing.

As petitioner argued before the Third Circuit, the reach of section 229 is remarkably broad on its face. Federal statutes addressing assaultive conduct generally require proof of a federal interest as an element of the offense—requiring, for example, that the assault occur within the special jurisdiction of the United States, have an effect on interstate commerce, involve a victim with recognized federal status or protection, or otherwise relate to a federal interest. *See, e.g.*, 18 U.S.C. §§ 111–115, 1951, 2111, 2113, 2114.3. Unlike those statutes, however, section 229 contains no federal-interest element at all. Moreover, the government's theory of what constitutes a "chemical weapon" is almost limitless: seemingly any chemical that is used in a criminal act would qualify. The federal indictment against petitioner embraces a broad definition and contains no allegations of federal jurisdictional authority other than the mere invocation of the statute. And the absence of any jurisdictional element only underscores the troubling extent to which section 229 over-extends to address conduct lacking any nexus to a legitimate federal interest.

2. As the Third Circuit acknowledged, petitioner's challenge to the reach of section 229 raised an "issue[] of first impression" over "how far" federal treaty-implementing legislation "may reach into an area over which states possess primary authority." Pet. App. 9–10 & n.4. The federal government below justified section 229 and petitioner's prosecution on grounds that the Constitution's treaty power permits the enactment

of federal criminal statutes and prosecutions under such statutes without regard to bedrock constitutional federalism principles that would otherwise apply. In its view, section 229 was immune from ordinary constitutional scrutiny because it was enacted pursuant to Congress's Article I, § 8 authority to pass legislation "necessary and proper" to implement the Treaty Power. That sweeping position, however, would mean that any federal criminal statute passed to effectuate the terms of an international treaty necessarily expands the constitutional scope of Congress's authority. It is not at all clear that the Framers who conceived of an alternative method of amending the Constitution, *see* U.S. Const. art. V, intended to allow this kind of self-aggrandizement.

As the Third Circuit recognized, the question of whether the Tenth Amendment limits Congress's Treaty Power has generated "significant scholarly debate." Pet. App. 9 n.4. This Court's decision nearly a century ago in *Missouri v. Holland*, 252 U.S. 416 (1920), has generated significant confusion, criticism, and calls for overruling. *Holland* involved a federal statute passed to implement a U.S. treaty with Great Britain regulating the hunting of migratory birds. This Court stated that "[i]f the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government." *Id.* at 432. But that statement lies "in deep tension with the fundamental constitutional principle of enumerated legislative powers" and requires fundamental reassessment in light of modern limitations on Congress's legislative authority and the proliferation

of U.S. treaty commitments. *See* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867, 1868 (2005). Scholars have therefore argued that to the extent *Holland* suggests that Congress may violate bedrock principles of federalism when it enacts treaty-implementing legislation, it should be limited or overruled. *See id.* at 1938; Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 Mich. L. Rev. 98, 100 (2000).

The uncertainties about the intersection of treaty law and federalism are at their apex in matters of criminal punishment—a growing subject of treaty-making. *See* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 400 (1998). The legislation implementing the International Convention Against the Taking of Hostages, 18 U.S.C. § 1203, for example, federalizes garden-variety kidnappings in the United States whenever a foreign citizen is involved.

The Third Circuit ducked these serious questions over the constitutionality of 18 U.S.C. § 229(a) and petitioner's resulting conviction, however, by barring her at the threshold on standing grounds. *See* Pet. App. 9–10. That result only underscores the extent to which the Third Circuit's bar on private-party standing to raise Tenth Amendment challenges absent state participation stifles private parties' capacity to bring important constitutional issues to the courts' attention. The holding below, if left uncorrected, would leave important issues of law unaired and unconstitutional applications of statutes unresolved.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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December 3, 2010

APPENDIX

APPENDIX

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18 U.S.C. § 229

Prohibited activities.

(a) Unlawful Conduct.— Except as provided in subsection (b), it shall be unlawful for any person knowingly–

(1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; or

(2) to assist or induce, in any way, any person to violate paragraph (1), or to attempt or conspire to violate paragraph (1).

(b) Exempted Agencies and Persons.—

(1) In general.— Subsection (a) does not apply to the retention, ownership, possession, transfer, or receipt of a chemical weapon by a department, agency, or other entity of the United States, or by a person described in paragraph (2), pending destruction of the weapon.

(2) Exempted persons.— A person referred to in paragraph (1) is—

(A) any person, including a member of the Armed Forces of the United States, who is authorized by law or by an appropriate officer of the United States to retain, own, possess, transfer, or receive the chemical weapon; or

(B) in an emergency situation, any otherwise nonculpable person if the person is attempting to destroy or seize the weapon.

(c) Jurisdiction.— Conduct prohibited by subsection (a) is within the jurisdiction of the United States if the prohibited conduct—

(1) takes place in the United States;

(2) takes place outside of the United States and is committed by a national of the United States;

(3) is committed against a national of the United States while the national is outside the United States; or

(4) is committed against any property that is owned, leased, or used by the United States or by any department or agency of the United States, whether the property is within or outside the United States.

18 U.S.C. § 229A

Penalties.

(a) Criminal Penalties.—

(1) In general.— Any person who violates section 229 of this title shall be fined under this title, or imprisoned for any term of years, or both.

(2) Death penalty.— Any person who violates section 229 of this title and by whose action the death of another person is the result shall be punished by death or imprisoned for life.

(b) Civil Penalties.—

(1) In general.— The Attorney General may bring a civil action in the appropriate United States district court against any person who violates section 229 of this title and, upon proof of such violation by a preponderance of the evidence, such person shall be subject to pay a civil penalty in an amount not to exceed $100,000 for each such violation.

(2) Relation to other proceedings.— The imposition of a civil penalty under this subsection does not preclude any other criminal or civil statutory, common law, or administrative remedy, which is available by law to the United States or any other person.

* * *

18 U.S.C. § 229F

Definitions.

In this chapter:

(1) Chemical weapon.— The term "chemical weapon" means the following, together or separately:

(A) A toxic chemical and its precursors, except where intended for a purpose not prohibited under

this chapter as long as the type and quantity is consistent with such a purpose.

(B) A munition or device, specifically designed to cause death or other harm through toxic properties of those toxic chemicals specified in subparagraph (A), which would be released as a result of the employment of such munition or device.

(C) Any equipment specifically designed for use directly in connection with the employment of munitions or devices specified in subparagraph (B).

* * *

(7) Purposes not prohibited by this chapter.— The term "purposes not prohibited by this chapter" means the following:

(A) Peaceful purposes.— Any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.

(B) Protective purposes.— Any purpose directly related to protection against toxic chemicals and to protection against chemical weapons.

(C) Unrelated military purposes.— Any military purpose of the United States that is not connected with the use of a chemical weapon or that is not dependent on the use of the toxic or poisonous properties of the chemical weapon to cause death or other harm.

(D) Law enforcement purposes.— Any law enforcement purpose, including any domestic riot control purpose and including imposition of capital punishment.

(8) Toxic chemical.—

(A) In general.— The term "toxic chemical" means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

(B) List of toxic chemicals.— Toxic chemicals which have been identified for the application of verification measures under Article VI of the Convention are listed in schedules contained in the Annex on Chemicals of the Chemical Weapons Convention.

* * *

18 U.S.C. § 2332b(g)

Acts of terrorism transcending national boundaries.

(g) Definitions.— As used in this section —

* * *

(5) the term "Federal crime of terrorism" means an offense that—

(A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and

(B) is a violation of —

(i) section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175 or 175b (relating to biological weapons), 175c (relating to variola virus), 229 (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 (relating to congressional, cabinet, and Supreme Court assassination and kidnapping), 831 (relating to nuclear materials), 832 (relating to participation in nuclear and weapons of mass destruction threats to the United States) 2 842(m) or (n) (relating to plastic explosives), 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death) [...]

* * *

18 U.S.C. § 3142(f)

Release or detention of a defendant pending trial.

(f) Detention Hearing.— The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community—

(1) upon motion of the attorney for the Government, in a case that involves—

(A) a crime of violence, a violation of section 1591, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;

* * *

18 U.S.C. § 3143(b)

Release or detention of a defendant pending sentence or appeal.

(b) Release or Detention Pending Appeal by the Defendant.—

* * *

(2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained.

22 U.S.C. § 6701

Definitions.

In this chapter:

(1) Chemical weapon

The term "chemical weapon" means the following, together or separately:

(A) A toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose.

(B) A munition or device, specifically designed to cause death or other harm through toxic properties of those toxic chemicals specified in subparagraph (A), which would be released as a result of the employment of such munition or device.

(C) Any equipment specifically designed for use directly in connection with the employment of munitions or devices specified in subparagraph (B).

* * *

(8) Purposes not prohibited by this chapter

The term "purposes not prohibited by this chapter" means the following:

(A) Peaceful purposes

Any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.

(B) Protective purposes

Any purpose directly related to protection against toxic chemicals and to protection against chemical weapons.

(C) Unrelated military purposes

Any military purpose of the United States that is not connected with the use of a chemical weapon and that is not dependent on the use of the toxic or poisonous properties of the chemical weapon to cause death or other harm.

(D) Law enforcement purposes

Any law enforcement purpose, including any domestic riot control purpose and including imposition of capital punishment.

* * *

(13) Toxic chemical

(A) In general

The term "toxic chemical" means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

* * *

RESPONDENT'S BRIEF

(2)

No. 09-1227

In the Supreme Court of the United States

CAROL ANNE BOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner has standing to claim that 18 U.S.C. 229(a) exceeds Congress's powers under Article I of the Constitution and, for that reason, is inconsistent with the Tenth Amendment.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 581 F.3d 128. The decision of the district court (Pet. App. 26-36) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2009. A petition for rehearing was denied on December 10, 2009 (Pet. App. 25). On March 9, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including April 9, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Pennsylvania, peti-

tioner was convicted of possessing and using a chemical weapon, in violation of 18 U.S.C. 229(a)(1), and theft of mail, in violation of 18 U.S.C. 1708. She was sentenced to six years of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1-24.

1. In 1993, the Senate ratified an international treaty known as the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction (the Convention), *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993), 1974 U.N.T.S. 45. Member states, including the United States, pledged "never under any circumstances" to "use chemical weapons" or to "develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone." Pet. App. 39. The Convention also required each member state to, *inter alia*, enact domestic penal legislation that prohibits "natural and legal persons anywhere on its territory * * * from undertaking any activity prohibited to a State Party" under the Convention. *Id.* at 40. In accordance with this treaty commitment, Congress passed the Chemical Weapons Convention Implementation Act of 1998 (Implementation Act), Pub. L. No. 105-277, 112 Stat. 2681, (22 U.S.C. 6701 *et seq.*) and corresponding penal legislation, see 18 U.S.C. 229 *et seq.*

The criminal provisions in the Implementation Act mirror the prohibitions in the Convention. The statute makes it unlawful for a person knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon," 18 U.S.C. 229(a)(1), and it defines "chemical weapon" as "[a] toxic

chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose," 18 U.S.C. 229F(1)(A). A "toxic chemical" is "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals" and "includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." 18 U.S.C. 229F(8)(A).

2. In November 2006, petitioner began attempting to expose Myrlinda Haynes to toxic chemicals after learning that Haynes was having an affair with petitioner's husband and was pregnant as a result. Pet. App. 2, 48-49. To implement her plan, petitioner stole a quantity of 10-chloro10H-phenoxarsine from her employer and ordered a vial of potassium dichromate over the Internet. *Id.* at 2. As a trained microbiologist, petitioner understood that the chemicals were toxic if swallowed or touched and were potentially lethal in relatively small doses. *Id.* at 2, 22-24, 62.

Over several months, petitioner deposited the chemicals 24 times on various surfaces that she knew Haynes would touch, including car door handles and Haynes's mailbox. Pet. App. 2. Haynes usually noticed the powder before touching it and injuring herself, but, on one occasion, she sustained a chemical burn on her thumb. *Ibid.* After Haynes complained about the powder to her letter carrier, postal inspectors set up surveillance at her house and identified petitioner as the perpetrator of the attacks. *Id.* at 3. Following petitioner's arrest, she admitted taking the chemicals from her employer. *Ibid.*

A grand jury in the Eastern District of Pennsylvania returned a four count indictment charging petitioner with two counts of possessing and using a chemical weapon, in violation of 18 U.S.C. 229(a)(1), and two counts of stealing mail, in violation of 18 U.S.C. 1708. Pet. App. 4. As relevant here, petitioner moved to dismiss the Section 229 counts on the ground that Congress exceeded its Article I authority in enacting the statute. The district court denied the motion. *Id.* at 4, 28.

3. On appeal, petitioner renewed her constitutional challenge to the statute. She contended that 18 U.S.C. 229 prohibits local criminal conduct that is a matter of state regulation, contains no jurisdictional element, and could not be justified by Congress's treaty power. Pet. C.A. Br. 9-12. In petitioner's view, Section 229 was therefore not "based on a valid exercise of constitutional authority" and represented "an unjustifiable expansion of federal law enforcement into state-regulated domain." *Id.* at 10-11; see *id.* at 16-27 (arguing that "[t]he essential question before this Court is whether the federal government can utilize international treaties to enact criminal legislation addressing subjects that are otherwise beyond Congress's legislative powers," and answering that it cannot). Her opening brief did not cite the Tenth Amendment to the Constitution. In response, the government argued that "[b]ecause the statute * * * was enacted pursuant to a valid international treaty, it is supported by Congress' treaty power and the Necessary and Proper Clause" and that "[a]s a consequence, that statute does not violate the Tenth Amendment." Gov't. C.A. Br. 18.

Following oral argument, the court of appeals asked for supplemental briefing on whether petitioner "ha[s] standing to assert that 18 U.S.C. 229 encroaches on

state sovereignty in violation of the Tenth Amendment to the United States Constitution absent the involvement of a state or its instrumentalities." 08-2677 Docket entry (3d Cir. Aug 14, 2009). In response, the government acknowledged that it had not previously raised a standing objection but relied on this Court's decision in *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118 (1939) (*TVA*), to argue that petitioner lacked standing "to assert an infringement of state sovereignty in violation of the Tenth Amendment." Gov't Supp. C.A. Br. 1-2.

4. The court of appeals concluded that petitioner lacked standing to raise her constitutional claim. Pet. App. 11-16. It stated that the "courts of appeals are split on whether private parties have standing to challenge a federal act on the basis of the Tenth Amendment." *Id.* at 12. After discussing the cases, the court said it was "persuaded by the reasoning advanced by the majority of [its] sister courts and conclude[d] that a private party lacks standing to claim that the federal Government is impinging on state sovereignty in violation of the Tenth Amendment, absent the involvement of a state or its officers as a party or parties." *Id.* at 14. The court deemed this Court's decision in *TVA* to be controlling on the issue and stated that it was therefore bound to follow it. *Id.* at 14-15 (citing *Rodriguez de Quijas* v. *Shearson*, 490 U.S. 477, 484 (1989)). The court disagreed with petitioner that its conclusion barred "any recourse" for individuals like petitioner "in the face of Tenth Amendment violations accepted by a state." *Id.* at 16 n.8. In the court's view, if a State "refuse[d] to prosecute a viable Tenth Amendment claim, the citizens of that state may have recourse to local political processes to effect

change in the state's policy of acquiescence." *Ibid.* (citation omitted).

DISCUSSION

Petitioner contends (Pet. 19-26) that the court of appeals erred in concluding that she does not have standing to assert a claim that 18 U.S.C. 229 exceeded Congress's enumerated powers and thus violates the Tenth Amendment. The government agrees with that contention. A criminal defendant has standing to defend herself by arguing that the statute under which she is being prosecuted was beyond Congress's Article I authority to enact. The court of appeals' contrary conclusion was based on this Court's statement in *TVA*, *supra*, that the private parties in that civil case "ha[d] no standing to raise any question * * * under the [Tenth] [A]mendment" "absent the states or their officers" as parties to the litigation. 306 U.S. at 144; see Pet. App. 11. That portion of *TVA* addressed a distinct kind of Tenth Amendment claim involving unwarranted intrusions into State sovereignty and not a claim, like that here, that a statute exceeds Congress's enumerated powers. The Court has repeatedly permitted private parties to press such enumerated-power claims, and the court of appeals erred by not doing so here. The Court should grant the petition, vacate the judgment of the court of appeals, and remand for further proceedings in light of the position of the United States asserted in this brief.

1. In *TVA*, a group of private utilities raised various constitutional challenges to the TVA, which was selling low-cost electricity in competition with them. The TVA's wholesale electricity supply contracts required distributors to agree to resell the power at specified retail rates, and the private utilities contended that this amounted to "regulating" not only the TVA's "own rates and ser-

vice," but also "the rates and service of distributors of its power," and, by extension, "the rates of privately owned and state-regulated utilities" that had to compete with the TVA-supplied entities. 306 U.S. at 123; see *id.* at 143-144. The utilities argued that "[t]he distribution and sale of electricity within [a] State is a local public service, subject to full and complete regulation by the State under its police powers" and that the TVA's rate practices would "destroy[]" the regulatory "power[] of the States" in the area in violation of the Tenth Amendment. *Id.* at 122, 123; see *id.* at 136 (utilities claimed that TVA's sale of electricity effectively constituted "federal regulation of the internal affairs of the states" in violation of the Tenth Amendment); see also *id.* at 143 (Utilities argued that "since the [TVA] sells electricity at rates lower than those heretofore maintained by the [private utilities] such sale is an indirect regulation of [their] rates" in violation of the Tenth Amendment.).[1]

The Court rejected this claim on alternative grounds. The Court first explained that there was no Tenth Amendment violation because the TVA's practice of putting retail price terms in its wholesale contracts was not "regulation of the [private competitors'] business" but "nothing more than an incident of competition." *TVA*, 306 U.S. at 143-144; see *id.* at 144 ("The sale of

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[1] As their principal form of relief, the private utilities sought an injunction barring the TVA from "generating electricity out of water power" and from selling such power "in competition with any of the complainants." *TVA*, 306 U.S. at 135. Consistent with their Tenth Amendment claim, however, they also sought an injunction barring the TVA "from regulating their retail rates through any contract, scheme or device; and from substituting federal regulation for state regulation of local rates for electric service, more especially by incorporating in contracts for the sale of electricity terms fixing retail rates." *Ibid.*

government property in competition with others is not a violation of the Tenth Amendment."). The Court also found that the utilities lacked standing to raise this claim. The Court had previously noted that the States in which the TVA operated had expressly authorized municipal and non-profit utilities to obtain power from the TVA. See *id.* at 141-142. The Court thus explained, "[a]s we have seen there is no objection to the [TVA's] operations by the states, and, if this were not so, the [utility companies], absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] [A]mendment." *Id.* at 144.

The private utilities had separately argued that the statute establishing the TVA was not a proper "exercise of the federal power to improve navigation and control floods in the navigable waters of the nation" and that it was a "plain attempt, in the guise of exerting granted powers, to exercise a power not granted to the United States, namely, the generation and sale of electric energy." *TVA*, 306 U.S. at 135-136; see *id.* at 120. The Court rejected that enumerated-power claim on a distinct standing ground, namely that the utilities could not sue based on "damage consequent on competition, otherwise lawful." *Id.* at 140.[2]

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[2] The district court decision affirmed by the Supreme Court in *TVA* similarly distinguished between the two constitutional claims advanced by the utilities. It noted that the utilities "contend that the TVA statutes constitute an unlawful interference with the police power of the states because they regulate the rates of utilities which themselves are subject to state regulation." *Tennessee Elec. Power Co.* v. *Tennessee Valley Auth.*, 21 F. Supp. 947, 959-960 (E.D. Tenn. 1938), aff'd, 306 U.S. 118 (1939); see *id.* at 960 ("The statute does not fix, nor purport to fix, the complainants' rates. But the contention is that the lower rates of the TVA will inevitably force complainants to lower their rates."). The district court noted that the states in which the TVA operated had

2. As the court of appeals noted, *TVA* holds that "a private party lacks standing to claim that the federal Government is impinging on state sovereignty in violation of the Tenth Amendment, absent the involvement of a state or its officers as a party or parties." Pet. App. 14. The court of appeals accurately summarized the rule of *TVA* but erroneously thought it barred petitioner's argument in this case. Petitioner is not advancing a "state sovereignty" claim like the one that *TVA* held was unavailable to private parties. For example, petitioner does not contend that 18 U.S.C. 229 unconstitutionally dictates how Pennsylvania must exercise its regulatory authority over toxic chemicals. Instead, petitioner argues that the statute was enacted in excess of Congress's Article I powers. As noted above, this Court in *TVA* did not reject the utilities' analogous Article I claims on third-party standing grounds. It found the absence of State parties significant only with respect to the utilities' entirely distinct claim that the TVA was interfering with the States' regulatory authority over electricity rates.

The source of the confusion over the meaning of *TVA* is the "Tenth Amendment" label now applied to both types of claims. When the Court in *TVA* found that the private parties lacked standing to assert their Tenth

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authorized utilities to purchase power from the TVA and that "no state has intervened as a party in this proceeding to protest that its laws are violated by the TVA." *Ibid.* "Questions of the conflict of the TVA statute with the sovereign power of the states are not properly raised until the interested parties are before the court." *Ibid.* In a separate portion of its opinion, the district court rejected on the merits the utilities' distinct contention that the TVA statute was beyond Congress's enumerated powers, and the court did not interpose any standing barrier to that claim. See *id.* at 958-959.

Amendment claim, it was referring to their claim that the TVA was effectively dictating how the States would be able to exercise their sovereign power to set intrastate utility rates. 306 U.S. at 143-144. The claim bore a resemblance to those addressed more recently in cases such as *New York* v. *United States*, 505 U.S. 144, 161 (1992) (Tenth Amendment bars Congress from "commandee[ring] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program") (citation omitted), and *Printz* v. *United States*, 521 U.S. 898, 933 (1997) ("The Federal Government may not compel the States to enact or administer a federal regulatory program.") (quoting *New York*, 505 U.S. at 188). In such cases, an enumerated power may give Congress authority over a subject, but the Tenth Amendment prohibits Congress from exercising that authority in a way that unduly intrudes on State sovereignty. *Id.* at 924.

In a separate category of cases, the Tenth Amendment has been cited when the Court has considered whether a statute is "authorized by one of the powers delegated to Congress in Article I of the Constitution." *New York*, 505 U.S. at 155. In such cases, the Tenth Amendment is the "mirror image[]" of an enumerated power: "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *Id.* at 156.

Petitioner in this case advances this second type of "Tenth Amendment" claim. She contends that 18 U.S.C. 229 was not authorized by the treaty power or any other power conferred on Congress in the Constitution and for

that reason intrudes upon the domain of the States. *E.g.*, Pet. C.A. Br. 18 ("Utilizing the Treaty Power to create plenary federal criminal jurisdiction over conduct that federal law enforcement could not otherwise reach would violate the Constitution's limitations on federal government domain."); see *McConnell* v. *FEC*, 540 U.S. 93, 186, 187 (2003) (contrasting Tenth Amendment claims involving "laws that commandeer the States and state officials in carrying out federal regulatory schemes" with claims that statutes "regulat[ing] the conduct of private parties" breached the "absolute boundaries of congressional power under Article I"), overruled in part on other grounds, *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010).

The Court has often decided enumerated-powers claims analogous to petitioner's on the merits, without any suggestion that the absence of a state litigant undermined standing. See, *e.g.*, *United States* v. *Comstock*, 130 S. Ct. 1949, 1964-1965 (2010) (rejecting on the merits claim by individuals, against whom federal government had instituted civil commitment proceedings, that civil commitment statute was enacted in excess of Congress's Article I authority); *United States* v. *Morrison*, 529 U.S. 598 (2000) (agreeing with civil defendant's claim that portion of Violence Against Women Act, 42 U.S.C. 13981, under which he had been subject to suit exceeded Congress's Commerce Clause authority); *United States* v. *Lopez*, 514 U.S. 549 (1995) (reversing criminal conviction for possession of a firearm in a school zone because statute exceeded Congress's Commerce Clause authority); *Perez* v. *United States*, 402 U.S. 146 (1971) (rejecting criminal defendant's claim that federal loan-sharking statute exceeded Congress's Commerce Clause power). That neither the Court nor

the litigants in those cases thought to question standing reflects an apparent recognition that an individual subject to loss of liberty or property as the result of a federal statute regulating her primary conduct has standing to argue the statute exceeded Congress's Article I authority. And this remains true even when a litigant asserts that the federal statute "violates the Tenth Amendment because it invades the province of state sovereignty in an area typically left to state control." *Comstock*, 130 S. Ct. at 1962 (internal quotation marks omitted); see *ibid.* (recognizing that Tenth Amendment claim in this context is answered by determining whether the action is authorized by Congress's enumerated powers and that "[i]n the end . . . it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment") (quoting *New York*, 505 U.S. at 159).

The distinction between the two types of claims is further illustrated by *Pierce County* v. *Guillen*, 537 U.S. 129 (2003). The Court granted a petition for a writ of certiorari in that case to address two questions:

> 1. Whether 23 U.S.C. §409, which protects certain documents "compiled or collected" in connection with certain federal highway safety programs from being discovered or admitted in federal or state trials, is a valid exercise of Congress' power under the Supremacy, Spending, Commerce or Necessary and Proper Clauses of the United States Constitution.

> 2. Whether private plaintiffs have standing to assert "states' rights" under the Tenth Amendment where their State's Legislative and Executive branches expressly approve and accept the benefits and terms of the federal statute in question.

Pet. at i, *Pierce County*, *supra* (No. 01-1229); see 535 U.S. 1033 (2002) (granting the petition for a writ of certiorari).

The Court decided the first question on the merits, finding that the statute was a "proper exercise" of Congress's power under the Commerce Clause. *Pierce County*, 537 U.S. at 146-148. The enumerated power claim in that case was advanced by a private party, see *id.* at 136, but the Court did not suggest there was any standing problem that would bar its consideration.

The Court noted that the private party had separately contended that the statute "violates the principles of dual sovereignty embodied in the Tenth Amendment because it prohibits a State from exercising its sovereign powers to establish discovery and admissibility rules to be used in state court for a state cause of action." *Pierce County*, 537 U.S. at 148 n.10. The Court noted that the Washington Supreme Court "did not address this precise argument, reasoning instead that the [statute] was beyond Congress' enumerated powers." *Ibid.* The Court declined to consider the question in the first instance and thus found it unnecessary to "address the second question on which we granted certiorari: whether private plaintiffs have standing to assert 'states' rights' under the Tenth Amendment where their States' legislative and executive branches expressly approve and accept the benefits and terms of the federal statute in question." *Ibid.* The Court in *Pierce County* thus

recognized that this particular standing question was relevant only to the state-sovereignty-oriented Tenth Amendment claim and not one based on the scope of Congress's Article I authority.[3]

3. The court of appeals said it was joining a "majority of [its] sister courts" in finding a lack of standing in this case, Pet. App. 14, but it failed to recognize that the decisions on which it relied all found standing lacking when private individuals attempted to assert Tenth Amendment claims of the commandeering and state-sovereignty variety. Such claims, the courts held, should be advanced by the States themselves. See *United States* v. *Hacker*, 565 F.3d 522, 524, 525-527 (8th Cir.) (considering on the merits criminal defendant's Commerce Clause challenge to Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16901, *et seq.*, but finding he lacked standing on separate claim that the statute "violated the Tenth Amendment by compelling states to accept registrations from a federally mandated sex-offender program"), cert. denied, 130

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[3] In *Pierce County*, as here, the United States contended that the standing rule of *TVA* barred only claims that a federal statute "violates the Tenth Amendment, in the sense of invading a sphere of sovereignty reserved to the States or impermissibly interfering with the governmental structure of the States." U.S. Br. at 24, *Pierce County*, *supra* (No. 01-1229). The United States noted that while the Washington Supreme Court had "referred in passing in its decision to the Tenth Amendment and to [the federal statute's] effect on state sovereignty, its decision focused on whether [the statute] exceeds the permissible reach of Congress's Article I powers." *Id.* at 24-25 (internal citations omitted). "Once it is understood that Guillen's challenge to [the federal statute] involves alleged limitations on Congress's delegated powers rather than an alleged incursion on state sovereignty, it becomes clear that the Court may adjudicate Guillen's constitutional claim, even if neither the State nor the County joins in his challenge." *Id.* at 25.

S. Ct. 302 (2009); *Oregon* v. *Legal Servs. Corp.*, 552 F.3d 965, 972 (9th Cir. 2009) (only States have standing to pursue "Tenth Amendment [c]oercion [c]laim"); *Brooklyn Legal Servs. Corp.* v. *Legal Servs. Corp.*, 462 F.3d 219, 234-235 (2d Cir. 2006) (*Brooklyn Legal Servs.*) (no standing for private party to assert Tenth Amendment claim that federal restrictions "intrude[] unacceptably on state sovereignty" by "interfer[ing] with the states' ability to fund legal assistance programs * * * and perform important functions on behalf of state judicial systems"), cert. denied, 552 U.S. 810 (2007); *Medeiros* v. *Vincent*, 431 F.3d 25, 28-29, 33-36 (1st Cir. 2005) (private party lacked standing to claim that interstate fishery management plan "constitute[d] an unlawful 'commandeering' of Rhode Island's legislative prerogatives under the Tenth Amendment"), cert. denied, 548 U.S. 904 (2006); *United States* v. *Parker*, 362 F.3d 1279, 1284-1285 (10th Cir.) (no standing for private party to claim that use of Assimilative Crimes Act, 18 U.S.C. 13, to prosecute state-defined gun offense in federal court "violates the Tenth Amendment because it interferes with the state's Second Amendment powers"), cert. denied, 543 U.S. 874 (2004).

When, by contrast, private parties contend that a statute to which they are subject was beyond Congress's enumerated powers to enact, each of those courts of appeals considers the claim on the merits without dismissing for lack of standing. See, *e.g.*, *United States* v. *Volungus*, 595 F.3d 1, 9 (1st Cir. 2010) (Congress acted within its authority in enacting 18 U.S.C. 4248: "When the federal government exercises any of the powers granted to it by the Constitution, it is not a valid objection that the exercise may bring with it some incidents of the police power."); *United States* v. *Tom*, 565 F.3d

497, 502-506, 508 (8th Cir. 2009) (same; statute "does not upset the delicate federal state balance mandated by the Constitution."); *United States* v. *Lue*, 134 F.3d 79, 85 (2d Cir. 1998) (rejecting defendant's Tenth Amendment challenge to statute that implemented international treaty against hostage taking: "Since the Treaty Power was delegated to the federal government, whatever is within its scope is not reserved to the states: the Tenth Amendment is not material.") (citation omitted); *United States* v. *Hampshire*, 95 F.3d 999, 1004 (10th Cir. 1996) ("In light of our holding that congressional enactment of the [Child Support Recovery Act] does not violate the Commerce Clause, Mr. Hampshire's Tenth Amendment argument fails."), cert. denied, 519 U.S. 1084 (1997); *United States* v. *Mussari*, 95 F.3d 787, 791 (9th Cir. 1996) (rejecting Tenth Amendment challenge because "Congress act[ed] under one of its enumerated powers"), cert. denied, 520 U.S. 1203 (1997).

4. Notwithstanding the court of appeals' error, plenary review is not appropriate in this case. The court of appeals should be afforded an opportunity to reconsider the question in light of the position now taken by the government. In particular, since the court of appeals thought its standing ruling was compelled by *TVA*, Pet. App. 15, it should have an opportunity to revisit the question with a clear view of the nature of the Tenth Amendment claim actually at issue in that case.

Moreover, in a case decided after the one at issue here, the court of appeals demonstrated a correct understanding of the two types of Tenth Amendment claims and the related standing rules for each. In *United States* v. *Shenandoah*, 595 F.3d 151 (3d Cir. 2010), petition for cert. pending, No. 09-1205 (filed May 7, 2010), the court of appeals rejected on the merits a

criminal defendant's contention that SORNA "exceeded [Congress's] commerce clause authority," *id.* at 160, without any suggestion that the defendant lacked standing to make that claim. The court viewed differently the defendant's contention that "SORNA is unconstitutional because it compels New York law enforcement to accept registrations from federally-mandated sex offender programs in violation of the Tenth Amendment." *Id.* at 161. The court held that the defendant lacked standing to assert that distinct, state-sovereignty-oriented Tenth Amendment claim. *Id.* at 161-162 (citing *Hacker*, 565 F.3d at 525-526; *Brooklyn Legal Servs.*, 462 F.3d at 234-236; *Medeiros*, 431 F.3d at 33-36).

There is a reasonable likelihood that the court of appeals on remand will recognize that petitioner here, like the defendant in *Shenandoah*, has standing to contend that the statute under which she was prosecuted exceeds Congress's enumerated powers.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further proceedings in light of the position of the United States asserted in this brief.

Respectfully submitted.

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JULY 2010

RESPONDENT'S BRIEF

4

No. 09-1227

In the Supreme Court of the United States

CAROL ANNE BOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES SUPPORTING PETITIONER

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09-10

QUESTION PRESENTED

Whether petitioner has standing to claim that 18 U.S.C. 229, which prohibits possession or use of a chemical weapon, exceeds Congress's powers under Article I of the Constitution and, for that reason, is inconsistent with the Tenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 581 F.3d 128. The opinion (Pet. App. 26-35) and order (Pet. App. 36) of the district court denying petitioner's motion to dismiss the indictment are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2009. A petition for rehearing was denied on December 10, 2009 (Pet. App. 25). On March 9, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including April 9, 2010, and the petition was filed on that date. The petition for a writ of certiorari was granted on October 12,

2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent provisions are set out in an appendix to this brief. App., *infra*, 1a-9a.

STATEMENT

Following a conditional guilty plea in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on two counts of possessing and using a chemical weapon, in violation of 18 U.S.C. 229(a)(1), and two counts of theft of mail, in violation of 18 U.S.C. 1708. She was sentenced to six years of imprisonment, to be followed by five years of supervised release. Pet. App. 4-5.

Petitioner appealed her conviction and sentence on numerous grounds, including that Congress exceeded its authority under Article I of the Constitution in criminalizing the possession and use of chemical weapons. The court of appeals held that petitioner lacked standing to raise that claim. Pet. App. 1-24.

1. Concerned about the use of chemical weapons not only in conventional warfare but also by terrorists or others, the Senate approved and the United States ratified an international treaty that prohibited the development, possession, and use of chemical weapons by nations, private companies, and individuals. See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction (Convention or Chemical Weapons Convention), *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993), 1974 U.N.T.S. 45; 143 Cong. Rec. 5812 (1997). Member states, including the United States, pledged never to "use chemical weap-

ons" or to "develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone." Pet. App. 39. Each member state was required to "adopt the necessary measures to implement its obligations under this Convention." *Id.* at 40. In particular, each member state was required to enact domestic legislation—"including * * * penal legislation"—that prohibits "natural and legal persons anywhere on its territory * * * from undertaking any activity prohibited to a State Party" under the Convention. *Ibid.*

To fulfill its commitments under this treaty, Congress enacted the Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-857 (enacting 22 U.S.C. 6701 *et seq.* and 18 U.S.C. 229 *et seq.*). The criminal provisions of the Act, which mirror the prohibitions in the Convention, make it unlawful for a person knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. 229(a)(1); see Pet. App. 39. A "chemical weapon" is defined to include a "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter" (such as a legitimate industrial, agricultural, medical, or pharmaceutical purpose) and "as long as the type and quantity is consistent with such a purpose." 18 U.S.C. 229F(1)(A) and (7). A "toxic chemical" is a "chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." 18 U.S.C. 229F(8)(A). See Convention Art. II, S. Treaty Doc. No. 21, 103d Cong., 1st Sess. 282 (1993), 1974 U.N.T.S. at 327 (using same definitions). A person who violates the criminal provi-

sions of the Act may be fined, may be "imprisoned for any term of years," and may be subject to civil penalties. 18 U.S.C. 229A.

2. In 2005, petitioner learned that her husband was having an affair with a family friend, Myrlinda Haynes, and that Haynes had become pregnant as a result. Pet. App. 2. Petitioner "vowed revenge" and began harassing Haynes on the phone and through the mail. *Id.* at 2, 65.[1] Petitioner repeatedly phoned Haynes and made threatening statements like "'I [am] going to make your life a living hell,' and 'dead people will visit you.'" *Id.* at 48. Petitioner also sent Haynes harassing letters, including photos which "depicted Ms. Haynes'[s] face cut by some type of straight edge," and made disparaging remarks to Haynes's employer "in an attempt to have her fired." *Id.* at 65; see C.A. App. 299. Haynes reported this conduct to the local police, and in November 2005, petitioner was convicted of harassment in state court. Pet. App. 48, 64.

Petitioner then changed her tactics. From November 2006 through her arrest in June 2007, petitioner attempted to poison Haynes on 24 different occasions using highly toxic chemicals. Pet. App. 2; C.A. App. 278. Petitioner has an advanced degree in microbiology and was working for Rohm and Haas, a multinational chemical manufacturer. Pet. App. 2. Petitioner used her specialized scientific knowledge to "select unusually toxic chemicals" that would be harmful through topical exposure even if Haynes did not ingest them. *Id.* at 23. The first chemical, potassium dichromate, is a corrosive

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[1] Although the presentence investigation report (PSR) was filed under seal in the court of appeals, petitioner included a copy of it in the appendix to her petition and filed it publicly in this Court. See Pet. App. 43-91.

chemical that destroys human tissue on contact and causes systemic poisoning and kidney and liver damage when absorbed. *Id.* at 52; C.A. App. 249, 251. The second chemical, 10-chloro-10H-phenoxarsine, is an arsenic-based specialty chemical that damages the central nervous system and brain when absorbed or ingested. Pet. App. 53; C.A. App. 238-239. Both chemicals are lethal in very small doses (less than two teaspoons). Pet. App. 2 n.1; C.A. App. 238-239, 251-253.

Over a period of eight months, petitioner repeatedly placed these dangerous chemicals on various surfaces Haynes regularly touched, such as Haynes's front door, car door handles, and mailbox. Pet. App. 2, 32. Petitioner understood that these chemicals could be toxic or lethal if swallowed or touched. *Id.* at 2, 22-24, 62; C.A. App. 199-201. For that reason, petitioner wore gloves when applying these chemicals. C.A. App. 364-365. Fortunately, the chemicals were visible to the naked eye, and Haynes noticed them and took care to avoid touching them or exposing her infant daughter to them. Pet. App. 2. On one occasion, however, Haynes accidentally touched some of the potassium dichromate and was burned. *Id.* at 54; C.A. App. 286. If Haynes's infant daughter had come into contact with even a few crystals of that chemical, it could have been fatal. C.A. App. 252-253.

Haynes called the local police to report this suspicious activity. Pet. App. 2. The police speculated that the substances Haynes observed might be cocaine and suggested that she clean her car more frequently. *Ibid.*; C.A. App. 284-285. The police then tested the substance found on the car and determined that it was not cocaine. C.A. App. 279-280. Haynes contacted local law enforce-

ment authorities more than a dozen times, but they did not take further action. *Id.* at 279.

After Haynes noticed that the chemicals had been placed in her mailbox, she notified her letter carrier, who referred the matter to the United States Postal Inspection Service. Pet. App. 3; C.A. App. 286-287. Postal inspectors placed surveillance cameras in and around Haynes's home, and they saw petitioner opening Haynes's mailbox and stealing her mail. Pet. App. 3, 49. They also saw petitioner place a rag containing a red powdery substance inside Haynes's car muffler and go back and forth between her car and Haynes's car with chemicals. *Id.* at 3, 49-51. Chemical analysis revealed that the red powder was potassium dichromate and that a white powder found on Haynes's home and car was 10-chloro-10H-phenoxarsine. *Id.* at 51-53. Upon further investigation, inspectors learned that nearly four pounds of potassium dichromate were missing from the Rohm and Haas facility where petitioner worked, and that the 10-chloro-10H-phenoxarsine was directly traceable to that facility. *Id.* at 3, 50-51, 53; C.A. App. 204-206.

Federal authorities obtained an arrest warrant for petitioner and search warrants for her home and car. Pet. App. 3. The police executed the warrants and discovered quantities of both chemicals and pieces of Haynes's mail. *Id.* at 3-4; C.A. App. 33. After she was arrested, petitioner waived her rights and acknowledged that she had stolen the 10-chloro-10H-phenoxarsine from her employer. Pet. App. 3. Petitioner later stated that she had obtained the potassium dichromate over the Internet. *Id.* at 2; see *id.* at 51 & n.2.

3. A grand jury in the Eastern District of Pennsylvania returned an indictment charging petitioner with

two counts of possessing and using a chemical weapon, in violation of 18 U.S.C. 229(a)(1), and two counts of theft of mail, in violation of 18 U.S.C. 1708. Pet. App. 4; J.A. 13-16. Petitioner moved to dismiss the chemical weapons counts on the ground that Congress had exceeded its Article I authority in enacting Section 229. C.A. App. 46. She contended that "the charged statute does not represent a valid exercise of federal authority under the Commerce Clause, the treaty power, or other potential authority in the United States Constitution." *Ibid.*[2]

The district court denied the motion. Pet. App. 27-28, 36. The court explained that the statute was validly "enacted by Congress and signed by the President under the necessary and proper clause" to "comply with the provisions of a treaty." *Id.* at 28.[3]

Petitioner entered a conditional guilty plea to all four counts of the indictment, reserving her right to challenge the district court's denial of the motion to dismiss. Pet. App. 5. The district court sentenced her to six years of imprisonment, to be followed by five years of supervised release, and imposed a fine and a restitution order. *Ibid.*; C.A. App. 382.

4. On appeal, petitioner renewed her argument that Congress lacked the authority under the Constitution to

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[2] Petitioner contended that Section 229 is invalid both on its face and as applied to her. See, *e.g.*, C.A. App. 42, 53. Because the standing analysis in this case is the same as to both claims, there is no need to distinguish between them for current purposes.

[3] Although the district court also suggested that the statute might be a valid exercise of Congress's Commerce Clause power, C.A. App. 100, it did not reach that issue because it determined that the statute was a valid exercise of the Treaty Power and the Necessary and Proper Clause authority, *id.* at 168.

enact 18 U.S.C. 229. Petitioner defined the "essential question" as whether Congress can "utilize international treaties to enact criminal legislation addressing subjects that are otherwise beyond Congress's legislative powers." Pet. C.A. Br. 17. Petitioner contended that Congress cannot rely on the Treaty Power to enact a statute without "another [independent] basis in the Constitution to do so." *Id.* at 19.

In response, the government argued that "[b]ecause the statute * * * was enacted pursuant to a valid international treaty, it is supported by Congress' treaty power and the Necessary and Proper Clause." Gov't C.A. Br. 18 (citing *Missouri* v. *Holland*, 252 U.S. 416, 432 (1920)). "As a consequence," the government explained, "that statute does not violate the Tenth Amendment by infringing on the states' reserved powers." *Ibid.*; see *id.* at 27.

Following oral argument, the court of appeals requested supplemental briefing on the question whether petitioner "ha[s] standing to assert that 18 U.S.C. § 229 encroaches on state sovereignty in violation of the Tenth Amendment to the United States Constitution absent the involvement of a state or its instrumentalities." J.A. 17-18. In response, the government acknowledged that it had not previously raised a standing objection but argued that under this Court's decision in *Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118 (1939), petitioner lacked standing "to assert an infringement of state sovereignty in violation of the Tenth Amendment." J.A. 19.

5. The court of appeals concluded that petitioner lacked standing to raise her constitutional claim. Pet. App. 11-16. The court framed the question as "whether private parties have standing to challenge a federal act

on the basis of the Tenth Amendment." *Id.* at 12. The court believed that it was bound to answer this question in the negative in light of this Court's statement in *TVA* that private utilities could not challenge the sale of electrical power by a federally chartered company under the Tenth Amendment. *Id.* at 12, 14-15. The court therefore "conclude[d] that a private party lacks standing to claim that the federal Government is impinging on state sovereignty in violation of the Tenth Amendment, absent the involvement of a state or its officers as a party or parties." *Id.* at 14.

The court rejected petitioner's argument that she would have no recourse if the court found she lacked standing, stating that if a State "refuse[d] to prosecute a viable Tenth Amendment claim" a defendant could use the "local political processes to effect change in the state's policy of acquiescence." Pet. App. 16 n.8 (internal quotation marks omitted).[4]

6. Petitioner filed a petition for rehearing en banc, contending that the court of appeals erred in holding that she lacked standing to challenge her conviction on the ground that Congress lacked the authority under the Constitution to enact Section 229. Pet. for Reh'g En Banc 3-9. Petitioner stated that her "main argument" was that "Congress acted outside of its enumerated powers, thereby violating other provisions of the Constitution," and that her "Tenth Amendment argument" was

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[4] The court of appeals also rejected petitioner's arguments that Section 229 is unconstitutionally vague; that the warrants used to search her car and home were not supported by probable cause; and that the district court erred in applying a sentence enhancement because she used specialized knowledge to facilitate her crime. Pet. App. 16-24. Petitioner did not renew those arguments in her petition, and they are accordingly not before this Court.

"ancillary" to that claim. *Id.* at 6. The court of appeals denied the rehearing petition. Pet. App. 25.

SUMMARY OF ARGUMENT

Petitioner has standing to challenge her conviction on the ground that Congress exceeded its Article I authority in enacting 18 U.S.C. 229.

A. The court of appeals misapprehended the nature of petitioner's claim. Two different types of claims implicate the Tenth Amendment. The first type consists of claims that the federal government has interfered with a specific aspect of state sovereignty by, for example, commandeering state legislatures or executives. See, *e.g.*, *Printz* v. *United States*, 521 U.S. 898 (1997); *New York* v. *United States*, 505 U.S. 144 (1992). The second consists of claims that Congress exceeded its Article I authority in enacting legislation. See, *e.g.*, *United States* v. *Comstock*, 130 S. Ct. 1949 (2010); *Gonzales* v. *Raich*, 545 U.S. 1 (2005).

Petitioner has raised only an enumerated-powers claim, not an interference-with-sovereignty claim. She contends that Congress lacked the authority under the Constitution to enact Section 229, and that by enacting legislation in excess of its enumerated powers, Congress trespassed upon areas reserved to the States by the Tenth Amendment. Petitioner does not argue that the federal government has impermissibly directed or frustrated the activities of state legislatures or executives regarding chemical weapons. Instead, she focuses on Congress's regulation of chemical weapons and whether that regulation is within Congress's authority.

B. Petitioner has standing to raise her enumerated-powers claim. To establish Article III standing, petitioner must show that she has a concrete and particular-

ized injury that is fairly traceable to the challenged government action and that likely would be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Petitioner meets those requirements. She has been prosecuted and sentenced under a federal criminal statute. She contends that Congress lacked the authority to enact that statute and that her conviction is therefore invalid. If a federal court agreed with petitioner, the remedy would be to overturn her conviction. Petitioner therefore has established Article III standing. Further, there is no prudential barrier to petitioner's standing here. Petitioner is raising her own right to be free from punishment under a statute that is invalid, either facially or as applied to her, because it exceeds Congress's legislative authority. She is not asserting a State's sovereign right to set its own policy and conduct its own affairs.

The court of appeals' suggestion that a State must intervene in federal criminal prosecutions to raise enumerated-powers challenges on behalf of its citizens is directly contrary to this Court's decision in *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923), which established that a State generally cannot represent its citizens as *parens patriae*. Thus, the ruling of the court of appeals would leave the courts powerless to address claims that Congress exceeded its Article I authority, thereby denying effective recourse to defendants criminally prosecuted under statutes that are beyond Congress's authority to enact.

Other than the decision below, the government is not aware of any decision of this Court or of another court of appeals holding that a criminal defendant lacks standing to challenge the federal statute under which she was prosecuted on the ground that the statute exceeds the

scope of Congress's authority under Article I. At the same time, there are numerous decisions in both the criminal and civil context in which this Court has assumed that such standing exists and decided on the merits a private party's enumerated-powers challenge.

C. The court of appeals erroneously believed that it was bound to deny petitioner standing by this Court's decision in *Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118 (1939). The standing rule established in *TVA* is not applicable here, because it concerned a claim of impermissible interference with a specific aspect of state sovereignty, not an enumerated-powers claim.

Numerous decisions of this Court and the courts of appeals recognize the distinction, for standing purposes, between interference-with-sovereignty claims and enumerated-powers claims. These decisions confirm that, as a general matter, an individual may bring an enumerated-powers challenge to a statute that directly regulates that individual. Because petitioner does not raise an interference-with-sovereignty claim, this Court need not decide whether an individual may raise that distinct type of claim. But in the government's view, the *TVA* Court correctly held that only States or state officials have standing to raise such claims.

ARGUMENT

PETITIONER HAS STANDING TO ARGUE THAT 18 U.S.C. 229 EXCEEDS CONGRESS'S ARTICLE I AUTHORITY

Petitioner, a criminal defendant convicted under 18 U.S.C. 229, has standing to challenge her conviction on the ground that the statute exceeds the scope of Congress's authority under Article I. Petitioner has been prosecuted, convicted, and sentenced under Section 229. If her argument that Congress lacked Article I author-

ity to enact Section 229 were correct, petitioner's criminal conviction could not stand.

The court of appeals misapprehended petitioner's claim, analyzing it not as an enumerated-powers claim but as an interference-with-sovereignty claim that must be raised by a State.[6] But petitioner does not contend that the federal government has improperly directed or frustrated the activities of state officials; instead, she focuses entirely on Congress's authority to regulate individual conduct regarding chemical weapons. Because the challenged federal statute operates directly on petitioner to regulate her behavior, petitioner has standing to challenge it as unconstitutional. That conclusion is fully consistent with this Court's decision in *Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118 (1939), which held that private parties lack standing to raise interference-with-sovereignty claims because such claims properly belong to the States. The court of appeals' judgment therefore should be reversed.

A. Petitioner Has Brought Only An Enumerated-Powers Claim, Not An Interference-With-Sovereignty Claim

Determining whether an individual has standing to raise a claim "requires careful judicial examination" of the claim to determine "whether the particular [litigant] is entitled to an adjudication of the particular claim[] asserted." *Allen* v. *Wright*, 468 U.S. 737, 752 (1984). Here, the court of appeals characterized petitioner's claim as a "Tenth Amendment challenge to § 229." Pet.

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[6] In its supplemental brief to the court of appeals, the United States argued that petitioner lacked standing to bring her enumerated-powers claim. Upon further reflection, the government concluded to the contrary that petitioner has standing to bring her claim. See U.S. Cert. Br. 9-16.

App. 11; see *id.* at 12, 14-15; see also J.A. 17-18 (court's letter asking parties whether petitioner has standing to argue "that 18 U.S.C. § 229 encroaches on state sovereignty in violation of the Tenth Amendment to the United States Constitution"). That characterization, however, does not resolve the question whether petitioner has standing, because there are two different types of claims that potentially implicate the Tenth Amendment.

1. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X. This Court has recognized two distinct types of claims that implicate Tenth Amendment interests.

The first type consists of claims that the federal government has intruded upon a specific aspect of state sovereignty by, for example, directing the conduct of state legislators or executives. This type of claim was considered in cases such as *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997). In *New York*, the Court held that the Tenth Amendment forbids the federal government from "commandeer[ring] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." 505 U.S. at 161 (citation omitted). In *Printz*, the Court extended *New York*, prohibiting the commandeering of state executive branch officials. 521 U.S. at 933 ("The Federal Government may not compel the States to enact or administer a federal regulatory program." (quoting *New York*, 505 U.S. at 188)). See also *Reno* v. *Condon*, 528 U.S. 141, 151 (2000) (federal government may not "require the States in their sovereign capacity to regulate their own citi-

zens"). In such cases, although an enumerated power may give Congress authority over a subject, the Tenth Amendment prohibits Congress from exercising that authority in a way that unduly interferes with state sovereignty. *Printz*, 521 U.S. at 924; *New York*, 505 U.S. at 160.

The second type of claim consists of claims that Congress lacks the authority to legislate in a certain area. The key question in those cases is whether the challenged federal statute is a valid exercise of "one of the powers delegated to Congress in Article I of the Constitution." *New York*, 505 U.S. at 155. This Court has considered this type of challenge on numerous occasions, in cases such as *Gonzales* v. *Raich*, 545 U.S. 1 (2005), which concerned the Commerce Clause power; *Sabri* v. *United States*, 541 U.S. 600 (2004), which concerned the Spending Clause power; *Tennessee* v. *Lane*, 541 U.S. 509 (2004), which concerned Congress's authority to enforce the rights guaranteed by the Fourteenth Amendment; and *United States* v. *Comstock*, 130 S. Ct. 1949 (2010), which concerned Congress's authority under the Necessary and Proper Clause. In some (but not all) of these cases, the Court has invoked the Tenth Amendment, explaining that the Tenth Amendment is the "mirror image[]" of an enumerated power: "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York*, 505 U.S. at 156; see also, *e.g.*, *Comstock*, 130 S. Ct. at 1962.

This Court has specifically distinguished between these two types of claims. For example, this Court re-

cently explained that it has "focused" its attention in the Tenth Amendment context on "laws that commandeer the States and state officials in carrying out federal regulatory schemes." *McConnell* v. *FEC*, 540 U.S. 93, 186 (2003) (citing *Printz* and *New York*), overruled in part on other grounds by *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010). The Court "contrast[ed]" that type of claim with an enumerated-powers challenge to a federal statute that "regulates the conduct of private parties" and "imposes no requirements whatsoever upon States or state officials." *Ibid.* For that latter type of claim, the Court protects Tenth Amendment interests by "polic[ing] the absolute boundaries of congressional power under Article I." *Id.* at 187 (citing *United States* v. *Morrison*, 529 U.S. 598 (2000), and *United States* v. *Lopez*, 514 U.S. 549 (1995)).

2. Petitioner has advanced only one type of "Tenth Amendment" claim—a claim that Congress lacks the authority to criminalize the possession and use of chemical weapons. She does not contend that Congress has improperly commandeered state officials or otherwise interfered with a specific aspect of state sovereignty.

Throughout this case, the gravamen of petitioner's claim has been that Congress lacks the authority to criminalize the possession and use of chemical weapons under 18 U.S.C. 229. In moving to dismiss the indictment, petitioner argued that "there is no basis in the Constitution to support the enactment of 18 U.S.C. § 229 or its application to the particularly localized facts of this case." C.A. App. 42. She stated that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution," *id.* at 52 (quoting *Morrison*, 529 U.S. at 606), and she argued that Section 229 "does not represent a valid exercise of federal

authority under the Commerce Clause, the Treaty Power, or other potential authority in the United States Constitution," *id.* at 46.[6] In support of that contention, petitioner also argued that Section 229 contains no "federal nexus" and that crimes like assault are "routinely handled by law enforcement in state prosecutions." *Id.* at 58-59.

In the district court, the government understood petitioner as raising an enumerated-powers challenge, and it argued in response that Congress validly enacted Section 229 to implement a treaty using its Necessary and Proper Clause authority. Gov't Resp. to Mot. to Dismiss Indictment 7-8, 2:07-CR-528 Docket entry No. 30 (E.D. Pa. Nov. 13, 2008). The district court resolved the claim on that basis, holding that Section 229 was validly "enacted by Congress and signed by the President under the necessary and proper clause" to "comply with the provisions of a treaty." Pet. App. 28.

On appeal, petitioner renewed her contention that Congress lacked the authority to enact 18 U.S.C. 229. She again noted that Congress must have a source of authority in the Constitution for every law it enacts, Pet. C.A. Br. 9, and she contended that the Treaty Power and the Necessary and Proper Clause were insufficient to confer that authority without "another basis in the

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[6] See also C.A. App. 53 (arguing that "no conceivable basis in the Constitution exists that supports the enactment of 18 U.S.C. § 229"), 64 ("There is no valid basis in the Constitution supporting the enactment of 18 U.S.C. § 229 or its application to the alleged facts of this case."). In her reply brief in support of her motion to dismiss the indictment, petitioner defined the "essential question" before the court as "whether the federal government can utilize international treaties to enact criminal legislation addressing subjects that are otherwise beyond Congress's legislative powers." *Id.* at 82.

Constitution," *id.* at 19. Petitioner also argued that Section 229 "contains no federal nexus," *id.* at 11 (internal quotation marks omitted); see *id.* at 27, and constitutes an "unjustified expansion of federal law enforcement into state-regulated domain," *id.* at 10-11. Petitioner's brief did not cite the Tenth Amendment to the Constitution.

In response, the government explained that Section 229 was enacted to comply with the Chemical Weapons Convention, a valid treaty that furthers important national and international interests, and that Congress has the authority to enact such legislation under the Treaty Power and the Necessary and Proper Clause. Gov't C.A. Br. 21-32 (relying on, *inter alia*, *Missouri* v. *Holland*, 252 U.S. 416 (1920)). Because Congress had the authority under the Constitution to enact Section 229, the government argued, that statute does not "violate the Tenth Amendment by expanding federal law enforcement 'into state-regulated domain.'" *Id.* at 23 (quoting Pet. C.A. Br. 10-11).

After the court of appeals dismissed petitioner's claim for lack of standing, petitioner attempted to further clarify her claim. She stated that her "main argument" is that "Congress acted outside of its enumerated powers, thereby violating other provisions of the Constitution," in enacting Section 229. Pet. for Reh'g En Banc 6. Thus, petitioner has consistently explained her "Tenth Amendment" challenge as a claim that Congress lacked the constitutional authority to enact Section 229.

Petitioner has never suggested that Section 229 is constitutionally infirm because it commandeers state legislative or executive officials or otherwise interferes with a specific aspect of state sovereignty. Nor has petitioner raised any other type of Tenth Amendment claim.

It is true that, in her rehearing petition, petitioner stated that she was "challeng[ing] the constitutionality of the chemical weapons statute on three grounds": (1) that "Congress acted outside of its enumerated powers" in enacting Section 229; (2) that the statute "require[s] no proof of [a] federal nexus"; and (3) that "the enactment violate[s] the Tenth Amendment of the Constitution." Pet. for Reh'g En Banc 2. Petitioner characterized her enumerated-powers challenge as "separate and apart from a Tenth Amendment challenge," *id.* at 4 n.3, but she also said that her Tenth Amendment argument was "not critical" and was "ancillary to [her] main argument that Congress acted outside of its enumerated powers," *id.* at 6. Before this Court, petitioner frames her claim as whether Section 229 "is beyond the federal government's enumerated powers and inconsistent with the Tenth Amendment." Pet. i; see *id.* at 14, 22; Pet. Reply 2. But neither in this Court nor the court of appeals has petitioner identified any way in which Section 229 would violate the Tenth Amendment except to be in excess of Congress's delegated authority under Article I.

The course of this litigation has made clear that petitioner's only Tenth Amendment claim is that Congress exceeded its authority in enacting Section 229 and, for that reason, legislated in an area traditionally reserved to the States. Petitioner has invoked the Tenth Amendment only in that context, not as a direct limitation on Congress's authority, but as a "confirm[ation] that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York*, 505 U.S. at 157. See, *e.g.*, Pet. C.A. Br. 18 ("[u]tilizing the Treaty Power to create plenary federal criminal jurisdiction over conduct that federal law enforcement could not otherwise reach would violate

the Constitution's limitations on federal government domain"). It is well settled that, if Congress has exercised a power delegated to it in the Constitution, it is not intruding upon powers reserved to the States. See, *e.g.*, *Comstock*, 130 S. Ct. at 1962; *New York*, 505 U.S. at 156. Thus, a conclusion that Section 229 is a valid exercise of the Treaty Power and the necessary and proper authority answers petitioner's Tenth Amendment objection.[7]

3. In holding that petitioner lacked standing, the court of appeals misunderstood the nature of petitioner's claim. The court correctly observed that petitioner "asserts that § 229 violates constitutional principles of federalism because it is not 'based on a valid exercise of constitutional authority.'" Pet. App. 7 (quoting Pet. C.A. Br. 10). But the court then characterized petitioner's claim more generally as "a Tenth Amendment challenge to § 229," and relying on that characterization, turned to precedents that concerned the distinct type of Tenth Amendment claim involving commandeering of state officials or other interference with a specific aspect of state sovereignty. *Id.* at 11-14. Based on those precedents, the court concluded that petitioner lacked standing to challenge her conviction on Article I grounds. *Id.* at 15.

That was error. As explained below, whether there is standing to raise a Tenth Amendment claim depends on whether Congress's action is challenged as exceeding

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[7] Petitioner's suggestion that Section 229 is constitutionally infirm because it lacks a jurisdictional element likewise does not raise any independent Tenth Amendment argument. There is no general requirement that federal criminal statutes have jurisdictional elements. Rather, the presence or absence of such an element is one factor to consider in determining whether Congress is validly exercising its Article I authority. See, *e.g.*, *Sabri*, 541 U.S. at 605, 609.

Congress's authority under Article I or impermissibly interfering with a specific aspect of state sovereignty by, for example, commandeering state officials. That is not to say that different standing principles apply to these distinct types of claims. To the contrary—the standing question in both contexts is resolved using the same Article III and prudential principles that apply in all cases. But the results differ, because the different types of claims involve different legal rights and implicate different considerations.

B. A Criminal Defendant Has Standing To Argue That The Statute Under Which She Is Being Prosecuted Was Beyond Congress's Article I Authority To Enact

Petitioner has been prosecuted, convicted, and sentenced under a federal statute that criminalizes the possession and use of chemical weapons. She contends that Congress lacked the authority under the Constitution to enact that statute and that her conviction therefore must be reversed. Petitioner has standing to raise that claim.

1. Under Article III of the Constitution, the federal judicial power is limited to actual "Cases" and "Controversies," U.S. Const. Art. III, § 2, meaning that the federal courts are confined to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968). The requirement of Article III standing "enforces the Constitution's case-or-controversy requirement," *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004), by ensuring that persons seeking to invoke the federal courts' jurisdiction have a sufficiently personal stake in the dispute to ensure "concrete adverseness," *Baker* v. *Carr*, 369 U.S.

186, 204 (1962). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

In order to establish Article III standing, a party must show that she has suffered an "injury in fact" that is concrete and particularized, and not hypothetical or speculative; that the injury is fairly traceable to the challenged action and not the result of the "independent action of some third party not before the court"; and that it is "likely" that the injury will be "redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); see, *e.g.*, *Massachusetts* v. *EPA*, 549 U.S. 497, 517 (2007). These three requirements constitute the "irreducible constitutional minimum" required to demonstrate standing. *Lujan*, 504 U.S. at 560.

As this Court has explained, "[w]hen the suit is one challenging the legality of government action or inaction," the showing required to establish standing "depends considerably" on whether the person seeking to establish standing is the "object of the action * * * at issue." *Lujan*, 504 U.S. at 561. If she is, then there is "ordinarily little question" that the government's action caused her injury and that a judgment invalidating that action would redress that injury. *Id.* at 561-562. But when the party's "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," standing is "substantially more difficult to establish." *Id.* at 562 (internal quotation marks omitted). In that context, whether the elements of standing are met may depend not on the actions of the party bringing the challenge but on "the response of the

regulated * * * third party" who is not before the court. *Ibid.*

Petitioner meets each requirement for Article III standing. Petitioner contends that her conviction is unconstitutional because Congress lacked the Article I authority to enact Section 229. See, *e.g.*, C.A. App. 42, 52; Pet. C.A. Br. 9-11; see pp. 16-20, *supra*. Petitioner's criminal conviction under 18 U.S.C. 229 constitutes an injury in fact. That alleged injury is actual and concrete: petitioner has been convicted and sentenced to a six-year term of imprisonment, to be followed by a five-year term of supervised release, and has been ordered to pay a fine and restitution. Pet. App. 5; C.A. App. 380-386 (judgment). Further, petitioner's alleged injury is directly traceable to the government's actions, because Congress's enactment of Section 229 provided the basis for her conviction in federal court. If petitioner's argument that Congress exceeded its Article I authority in enacting Section 229 were correct, her conviction would be reversed and her injury would be redressed. See, *e.g.*, *Lopez*, 514 U.S. at 552.

Petitioner therefore has demonstrated an actual, concrete injury fairly traceable to government action that would be redressed if her enumerated-powers challenge succeeded. Indeed, this Court has remarked that "[a]n incarcerated convict's * * * challenge to the validity of his conviction always satisfies the case-or-controversy requirement, because the incarceration * * * constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction." *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998).

2. Even when a litigant satisfies the Article III standing requirements, prudential considerations may counsel against the exercise of federal jurisdiction. See,

e.g., *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984). For example, an individual "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499. In addition to "the general prohibition on a litigant's raising another person's legal rights," prudential standing also encompasses "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches" and the "requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Newdow*, 542 U.S. at 12 (quoting *Allen*, 468 U.S. at 751). These principles, although "closely related" to Article III's case-or-controversy requirement, are "essentially matters of judicial self-governance," designed to protect the federal courts from deciding abstract questions that may be more suited to resolution by the political branches or to judicial resolution in a different case. *Warth*, 422 U.S. at 500; see *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978).

There is no prudential barrier to adjudication of petitioner's enumerated-powers challenge to Section 229 in this case. Section 229 directly regulates private parties, making it unlawful for "any person" knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use" a chemical weapon. 18 U.S.C. 229(a)(1).[8] Petitioner has been prosecuted under Section

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[8] The statute prohibits "any person" from using or possessing chemical weapons, 18 U.S.C. 229, and it defines "person" to include any "State or any political subdivision," 18 U.S.C. 229F(5). But petitioner has never suggested that Section 229 violates the Tenth Amendment by including States and their subdivisions in its substantive provisions. In

229, and she is raising her own legal right to be free from prosecution under Section 229, not any rights of a third party. Petitioner has alleged a concrete and individualized injury—her conviction and sentence—and does not seek to raise a "generalized grievance[]" that is shared by other members of the public and is "most appropriately addressed in the representative branches." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 475 (1982) (quoting *Warth*, 422 U.S. at 499-500).[9]

In sum, petitioner is the appropriate litigant to pursue the claim that Section 229 exceeds Congress's Article I authority. "Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met." *Duke Power Co.*, 438 U.S. at 80-81.

3. The fact that petitioner has invoked the Tenth Amendment in her enumerated-powers challenge does not mean that her challenge must be advanced or joined by a State. Petitioner is not contending that Section 229 improperly regulates a State. By its terms, Section 229

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any event, petitioner would not have standing to raise a claim that Section 229 would be unconstitutional as applied to a State, because she would not suffer any injury from application of the statute to the State, and the State would be better positioned to challenge the statute's regulation of the State's activities.

[9] This case is unlike *Flores-Villar* v. *United States*, No. 09-5801 (argued Nov. 10, 2010), where the defendant lacks standing on prudential grounds because he wishes to raise his father's right to be free from impermissible gender discrimination, rather than his own rights. See U.S. Br. at 10-14, *Flores-Villar*, *supra*.

proscribes use or possession of chemical weapons; it does not "direct[] the State to enact a certain policy" or "to organize its governmental functions in a certain way." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). Petitioner has invoked the Tenth Amendment not as a protection against commandeering of state officials or other interference with a specific sovereign interest of a State, but rather as a confirmation of the limits on Congress's authority under Article I to regulate private parties. See, *e.g.*, *New York*, 505 U.S. at 157.

In fact, a State would not have standing to intervene in a federal criminal prosecution of one of its citizens to challenge Section 229 as outside the bounds of Congress's Article I authority. As this Court explained in *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923), a State generally does not have standing to challenge federal legislation on behalf of one of its citizens. In *Mellon*, the Court refused to adjudicate a State's claim that a federal statute "constitute[d] an attempt to legislate outside the powers granted to Congress by the Constitution and within the field of local powers exclusively reserved to the States." *Id.* at 482. The Court explained that a State may not represent its citizens as *parens patriae* because those citizens "are also citizens of the United States," and "it is no part of [the State's] duty or power to enforce [its citizens'] rights in respect of their relations with the Federal Government." *Id.* at 485-486. The Court emphasized that "[i]n that field it is the United States, and not the State, which represents [citizens] as *parens patriae*." *Id.* at 486.

This Court has recently reiterated that *Mellon* "prohibits" a state from suing the federal government "to protect her citizens from the operation of federal statutes." *Massachusetts* v. *EPA*, 549 U.S. 497, 520 n.17

(2007); see also *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) ("A State does not have standing as *parens patriae* to bring an action against the Federal Government."). And the Court has repeatedly applied that principle to preclude States from raising claims belonging to individuals. See, *e.g.*, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324 (1966) (State not permitted to raise due process and bill of attainder challenges to Voting Rights Act, because these provisions protect "individual persons and private groups," not States, and a State does not "have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government"); *Florida* v. *Mellon*, 273 U.S. 12, 16-17 (1927) (State may not challenge federal inheritance tax levied on individuals as inconsistent with Article I taxation authority, because the State has not "suffered a wrong furnishing ground for judicial redress").

Nor could a State raise in an individual criminal prosecution any independent interest of its own in challenging Section 229 as exceeding Congress's authority. A State has standing to challenge federal action that threatens its own distinct interests only when the federal action "inva[des] a legally protected interest" of the State, causing a concrete and particularized injury. *Lujan*, 504 U.S. at 560. A State suffers a cognizable Tenth Amendment injury when the federal government compels it to "enact or enforce a federal regulatory program." *Printz*, 521 U.S. at 935. But Section 229 does not require States to take any such action.

When faced with a claim that a federal law exceeds Congress's authority, the Court has consistently required persons concretely affected by the law to sue, rather than allowing a State to sue on an "abstract ques-

tion of legislative power," *i.e.*, whether the legislation "fall[s] within the field wherein Congress may speak with constitutional authority, or within the field reserved to the several States." *Texas* v. *ICC*, 258 U.S. 158, 162-163 (1922). That is because an alleged harm to the State's abstract interest in its own sovereignty is not itself a concrete injury. See, *e.g.*, *Mellon*, 262 U.S. at 484-485 (Court lacked jurisdiction to consider "abstract questions of political power" regarding the effect of federal statute on state sovereignty); *New Jersey* v. *Sargent*, 269 U.S. 328, 337 (1926) (allegation that federal law requiring licenses for use of navigable waters "go[es] beyond the power of Congress and impinge[s] on that of the State * * * do[es] not suffice as a basis for invoking an exercise of judicial power").[10] Accordingly, only a criminal defendant like petitioner, and not a State, has standing to bring an enumerated-powers challenge to Section 229 in an individual criminal prosecution.

Because a State may not sue on behalf of its citizens, the court of appeals' view would leave the courts powerless to address claims that Congress exceeded its Article I authority and therefore leave a defendant who was prosecuted under a statute that was beyond Congress's authority to enact with little recourse. Contrary to the court of appeals' suggestion (Pet. App. 16 n.8), the indi-

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[10] That is not to say that States may never bring an enumerated-powers challenge to a federal law. Whether a State has standing to bring such a claim depends on whether the law concretely affects the State. In the Spending Clause context, for example, federal statutes often place conditions on the States that choose to receive federal funds, and the States have standing to challenge those conditions as exceeding Congress's authority. See, *e.g.*, *South Dakota* v. *Dole*, 483 U.S. 203, 205, 207-208 (1987).

vidual cannot seek recourse through the state political process because the State cannot intervene in federal court on her behalf, and any potential recourse through the federal political process is unlikely to provide any effective remedy for the individual's injury. For that reason as well, criminal defendants are properly afforded the opportunity to raise enumerated-powers challenges to the federal statutes under which they are convicted.

4. Federal defendants regularly contend that Congress has exceeded its enumerated powers in enacting the statutes under which they are convicted, and this Court routinely has decided those claims on the merits, without any suggestion that the defendants lacked standing to bring such challenges. See, *e.g.*, *Sabri*, 541 U.S. at 607-608 (rejecting a criminal defendant's argument that the federal bribery statute exceeded Congress's Spending Clause authority); *Lopez*, 514 U.S. at 567-568 (reversing a criminal conviction for possession of a firearm in a school zone because the statute exceeded Congress's Commerce Clause authority); *Perez* v. *United States*, 402 U.S. 146, 156-157 (1971) (rejecting a criminal defendant's Commerce Clause challenge to the federal loan-sharking statute); *Champion* v. *Ames*, 188 U.S. 321, 353-354 (1903) (rejecting a criminal defendant's Commerce Clause challenge to a statute prohibiting interstate trafficking in lottery tickets). The courts of appeals likewise have regularly decided criminal defendants' enumerated-powers challenges to their statutes of conviction, without raising any standing concerns.[11]

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[11] See, *e.g.*, *United States* v. *Larsen*, 615 F.3d 780, 784-786 (7th Cir. 2010) (Commerce Clause challenge to the Interstate Domestic Violence

These decisions, of course, do not reflect square or binding holdings on the standing question. See, *e.g.*, *Lewis* v. *Casey*, 518 U.S. 343, 352 n.2 (1996). But the fact that this Court and the courts of appeals have repeatedly exercised jurisdiction in cases like this for at least a century evidences the courts' recognition that individual criminal defendants may bring such claims. See, *e.g.*, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 307 (1962) ("While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed *sub silentio*, neither should we disregard the implications of an exercise of judicial authority assumed to be proper for over 40 years.") (citations omitted).

The courts' adjudication of the merits of these claims reflects the view that "[a]n incarcerated convict's * * * challenge to the validity of his conviction always satisfies

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Act), petition for cert. pending, No. 10-7278 (filed Oct. 25, 2010); *United States* v. *Wright*, 607 F.3d 708, 715-716 (11th Cir. 2010) (Commerce Clause challenge to 18 U.S.C. 922(g)); *United States* v. *Bowers*, 594 F.3d 522, 527-530 (6th Cir. 2010) (Commerce Clause challenge to 18 U.S.C. 2251(a) & 2252(a)(4)(B)), cert. denied, No. 10-5737 (Oct. 4, 2010); *United States* v. *McCloud*, 590 F.3d 560, 568 (8th Cir. 2009) (Commerce Clause challenge to 18 U.S.C. 2251(a)), cert. denied, No. 09-1177 (Oct. 4, 2010); *United States* v. *Rene E.*, 583 F.3d 8, 16-19 (1st Cir. 2009) (Commerce Clause challenge to 18 U.S.C. 922(x)(2)(A)), cert. denied, 130 S. Ct. 1109 (2010); *United States* v. *Hawkins*, 513 F.3d 59, 61 (2d Cir.) (Commerce Clause challenge to 18 U.S.C. 2423(b)), cert. denied, 128 S. Ct. 2488 (2008); *United States* v. *Latu*, 479 F.3d 1153, 1156 (9th Cir.) (Commerce Clause challenge to 18 U.S.C. 922(g)), cert. denied, 552 U.S. 868 (2007); *United States* v. *Patton*, 451 F.3d 615, 620 (10th Cir. 2006) (Commerce Clause challenge to 18 U.S.C. 931(a)), cert. denied, 549 U.S. 1213 (2007); *United States* v. *Whited*, 311 F.3d 259, 264-272 (3d Cir. 2002) (Commerce Clause challenge to 18 U.S.C. 669); *United States* v. *Lue*, 134 F.3d 79, 85 (2d Cir. 1998) (Treaty Power and Necessary and Proper Clause challenge to 18 U.S.C. 1203).

the case-or-controversy requirement," *Spencer*, 523 U.S. at 7, and that, as a prudential matter, a criminal defendant is generally in the best position to mount an enumerated-powers challenge to her conviction. Although this Court has not directly faced a standing objection to a federal defendant's enumerated-powers claim, it has held that a state criminal defendant has standing to challenge a statute requiring segregated seating on interstate buses as exceeding the State's authority because it imposed an undue burden on interstate commerce, in violation of the Commerce Clause. See *Morgan* v. *Virginia*, 328 U.S. 373, 376-377 (1946). The Court explained that the defendant was the "proper person to challenge the validity of this statute as a burden on commerce" because the statute directly regulated where she could sit on the bus, and the "protection against burdens on commerce" therefore "[wa]s for her benefit." *Ibid.* The same logic applies here: Section 229 regulates the possession and use of toxic chemicals by private parties like petitioner, and she is therefore the proper person to challenge the statute as exceeding Congress's Article I authority.

That petitioner has standing here is supported by the numerous civil cases in which this Court also has decided on the merits individuals' claims that statutes regulating their conduct exceeded Congress's Article I authority. See, *e.g.*, *Comstock*, 130 S. Ct. at 1964-1965 (rejecting claim brought by individuals subject to federal civil commitment proceedings that statute authorizing such proceedings exceeded Congress's Article I authority); *Raich*, 545 U.S. at 15-22 (rejecting marijuana growers' and users' Commerce Clause challenge to federal laws criminalizing manufacture, distribution, and possession of marijuana); *Pierce County* v. *Guillen*, 537

U.S. 129, 147-148 (2003) (rejecting private party's Commerce Clause challenge to a federal statute precluding discovery or introduction at trial of documents compiled in connection with federal highway safety programs); *Morrison*, 529 U.S. at 607-627 (agreeing with a civil defendant who argued that a portion of the Violence Against Women Act exceeded Congress's Commerce Clause authority and remedial power under Section 5 of the Fourteenth Amendment).

These decisions, although again not square or binding holdings on the standing question, reflect an apparent recognition that an individual subject to imminent loss of liberty or property as the result of a federal statute that regulates her primary conduct has standing to argue the statute exceeded Congress's Article I authority. And an individual retains standing to bring such a claim even when, as part of the claim, the individual argues that the federal statute "violates the Tenth Amendment because it invades the province of state sovereignty in an area typically left to state control." *Comstock*, 130 S. Ct. at 1962 (internal quotation marks omitted). In that instance, the Tenth Amendment simply confirms that Congress's authority is limited to that delegated to it in Article I of the Constitution, and any Tenth Amendment concerns are answered by concluding that the challenged federal action is a valid exercise of Congress's Article I authority. See *ibid.*

The government is not aware of any decision by this Court or a court of appeals, other than the decision below, that has held that a criminal defendant lacks standing to challenge her conviction on the ground that Congress exceeded its Article I authority in enacting the statute under which she was convicted. As explained above, such a decision would run counter to basic stand-

ing principles and erect an unprecedented obstacle to criminal defendants seeking to challenge their convictions on constitutional grounds. This Court therefore should hold that a criminal defendant has standing to argue that Congress exceeded its Article I authority in enacting the statute under which she was convicted.

C. The Court Of Appeals Erred In Relying On *TVA* And Other Decisions Involving Claims That Congress Commandeered State Officers Or Otherwise Interfered With A Specific Aspect Of State Sovereignty

The court of appeals concluded that petitioner lacked standing based on this Court's decision in *Tennessee Electric Power Co.* v. *TVA*, *supra*. *TVA* is not applicable here, because the standing analysis in that case concerned an interference-with-sovereignty claim akin to a commandeering claim. The Court in *TVA* correctly held that only a State has standing to bring such a claim. But because petitioner does not raise such a claim, petitioner has standing under the familiar Article III and prudential principles described above.

1. In *TVA*, a group of private utilities sued the Tennessee Valley Authority, a corporation created by Congress that was selling low-cost electricity in competition with the private utilities. 306 U.S. at 127, 135; see 16 U.S.C. 831. Among other things, the utilities challenged the TVA's sale of electricity at wholesale to municipalities and cooperatives, which would then distribute the electricity further. *TVA*, 306 U.S. at 129, 136. The TVA's contracts with these distributors required them to agree to resell the power at specified retail rates. *Id.* at 129. The utilities contended that, by establishing certain resale rates in contracts with its distributors, the TVA was "indirect[ly] regulat[ing]" the rates

and service of distributors of power, and that regulation was an impermissible "federal regulation of purely local matters reserved to the states or the people by the Tenth Amendment." *Id.* at 143; see *id.* at 136 (utilities claimed that the TVA's sale of electricity effectively constituted "federal regulation of the internal affairs of the states" in violation of the Tenth Amendment), 140-142 (utilities claimed that the TVA's sale of electricity interfered with system of state regulation of utilities). The utilities therefore sought an injunction barring the TVA "from regulating their retail rates through any contract, scheme or device; and from substituting federal regulation for state regulation of local rates for electric service, more especially by incorporating in contracts for the sale of electricity terms fixing retail rates." *Id.* at 135.

The Court rejected the utilities' Tenth Amendment challenge on two alternative grounds. First, the Court rejected the claim on the merits, explaining that there was no Tenth Amendment violation because the TVA's practice of putting retail price terms in its wholesale contracts was not "regulation of the appellants' business" but was "nothing more than an incident of competition." *TVA*, 306 U.S. at 144; see *ibid.* ("The sale of government property in competition with others is not a violation of the Tenth Amendment."). Second, the Court remarked that the private utilities lacked standing to raise the Tenth Amendment objection in any event. The States in which the TVA operated had expressly authorized municipal and non-profit utilities to obtain power from the TVA. See *id.* at 141-142. The Court explained that "there is no objection to the [TVA's] operations by the states," and even "if this were not so, the [utility companies], absent the states or their

officers, have no standing in this suit to raise any question under the [Tenth] [A]mendment." *Id.* at 144.[12]

The utilities had also challenged the TVA's operations on a variety of other grounds. As relevant here, they also argued that the statute creating the TVA was not a proper "exercise of the federal power to improve navigation and control floods in the navigable waters of the nation" and was "a plain attempt" by Congress "to exercise a power not granted to the United States." *TVA*, 306 U.S. at 135-136; see *id.* at 120 (utilities' argument that "[b]oth the statutory scheme and the administrative plan are plainly attempts, in the guise of exercising the implied power to improve streams for navigation, to exercise power not granted but forbidden to the Federal Government"). The Court addressed that enumerated-powers claim separately from the utilities' "Tenth Amendment" challenge, and it rejected the claim on the distinct ground that the utilities could not sue based on "damage consequent on competition, otherwise lawful." *Id.* at 140.[13]

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[12] Although the dissenting Justice referred to the utilities as "public utilities," 306 U.S. at 148 (Butler, J., dissenting), the record makes clear that they were privately owned companies. See, *e.g.*, Appellants' Br. at 61-64, *TVA*, *supra* (No. 27) (describing nature of the utilities' business); Gov't Br. at 5, *TVA*, *supra* (No. 27) (describing the utilities as "fourteen privately owned corporations engaged in some phase of the business of generating, transmitting, and selling electricity").

[13] The district court decision affirmed by the Supreme Court in *TVA* similarly distinguished between these two different constitutional claims. The court first addressed the utilities' claim that the TVA statute was beyond Congress's enumerated powers. *Tennessee Elec. Power Co.* v. *TVA*, 21 F. Supp. 947, 958-959 (E.D. Tenn. 1938), aff'd, 306 U.S. 118 (1939). The court decided this claim on the merits, without suggesting that the utilities faced any standing barrier in raising it. The court concluded that Congress enacted the TVA statute "for

2. The court of appeals in this case held that petitioner lacked standing to argue that Section 229 exceeded Congress's constitutional authority because the court viewed itself as bound by this Court's statement in *TVA* that private utility companies "ha[d] no standing * * * to raise any question under the [Tenth] [A]mendment" "absent the states or their officers" as parties to the litigation. 306 U.S. at 144; see Pet. App. 11. In the court of appeals' view, *TVA* stands for the general proposition that "a private party lacks standing to claim that the federal Government is impinging on state sovereignty in violation of the Tenth Amendment, absent the involvement of a state or its officers as a party or parties." Pet. App. 14. Because petitioner "d[id] not even attempt to argue that her interests are aligned with those of a state," the court concluded that she "lack[ed]

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purposes within its constitutional powers," and that the TVA statute was "an appropriate means to accomplish these legitimate ends." *Id.* at 959.

In a separate portion of the opinion, the district court addressed the utilities' claim that "the TVA statutes constitute an unlawful interference with the police power of the states because they regulate the rates of utilities which themselves are subject to state regulation." *TVA*, 21 F. Supp. at 959-960. The court noted that the States in which the TVA operated had authorized utilities to purchase power from the TVA and that "no state has intervened as a party in this proceeding to protest that its laws are violated by the TVA." *Id.* at 960. The court determined that the private utilities were "not authorized to object on behalf of the states" and concluded that "[q]uestions of the conflict of the TVA statute with the sovereign power of the states are not properly raised until the interested parties are before the court." *Ibid.* In so holding, the court observed that it would be a "strange doctrine that acts authorized by a sovereign state constitute interference with its sovereign rights because of the fact that they are also authorized by the Federal Government." *Ibid.*

standing to pursue her Tenth Amendment challenge to § 229." *Id.* at 15.

TVA does not bar petitioner from asserting her enumerated-powers challenge here. The portion of *TVA* addressing a private party's standing to raise a Tenth Amendment claim addressed a different type of claim, involving unwarranted interference with a specific aspect of state sovereignty. The private utilities argued that TVA was "regulat[ing] * * * the internal affairs of the states" by effectively dictating how the States would be able to exercise their sovereign power to set intrastate utility rates. 306 U.S. at 135-136. That claim bore a resemblance to those addressed more recently in cases such as *New York* and *Printz*.[14] When the Court in *TVA* found that the private parties lacked standing to assert their Tenth Amendment claim, it was referring only to that claim. See *id.* at 143-144. The Court concluded that when the claim is an interference with a specific aspect of state sovereignty, only the State or state officials have standing to raise the claim. *Id.* at 143.

Petitioner is not advancing a claim based on interference with a specific aspect of state sovereignty such as the claim the Court found that private parties lacked standing to bring in *TVA*. She does not contend that 18 U.S.C. 229 unconstitutionally dictates how Pennsylva-

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[14] *TVA* did not involve a commandeering challenge, but instead involved a claim that the federal government interfered with state regulation in the sphere of authority reserved by the Constitution to the States. This Court has subsequently limited the scope of such claims under the Tenth Amendment. See *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). But the claims at issue in *TVA* parallel commandeering claims because they involved an alleged interference with a specific aspect of state sovereignty, rather than the reach of particular enumerated powers under Article I.

nia must exercise its regulatory authority over toxic chemicals. Nor could she, because Section 229 places no restrictions on whether or how a State criminalizes use of toxic chemicals as weapons. Instead, petitioner argues that the statute was enacted in excess of Congress's Article I powers. See pp. 16-20, *supra*.

The *TVA* Court found that the utilities lacked standing because they attempted to raise a claim predicated on the States' interests. Here, petitioner's claim asserts her own right to be free from prosecution under a criminal statute that she alleges Congress lacked the authority under Article I to enact. Allowing petitioner to raise such a claim is fully consistent with *TVA*, because the *TVA* Court found the absence of state parties significant only with respect to the utilities' claim that the TVA was interfering with the States' regulatory authority over electricity rates. 306 U.S. at 144. The *TVA* Court separately considered the utilities' enumerated-powers challenge and rejected that challenge on other grounds. *Id.* at 140. Because petitioner's claim is fundamentally different from the interference-with-sovereignty claim at issue in *TVA*, and does not raise the third-party standing concerns animating the Court's decision in *TVA*, *TVA* does not bar the adjudication of petitioner's claim here.[15]

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[15] The *TVA* Court's conclusion that the utilities lacked standing to raise their enumerated-powers challenge does not mean that petitioner lacks standing here. The Court's rejection of the utilities' challenge was based on its prior decisions holding that a party may not sue for "damage consequent on competition, otherwise lawful," 306 U.S. at 140; it was not based on any third-party standing barrier. In any event, this Court has recognized that standing doctrine has evolved since *TVA*. As the Court has explained, *TVA* required a litigant to demonstrate the invasion of a "'legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute

3. In holding that petitioner lacked standing to raise her Tenth Amendment claim, the court of appeals stated that it was joining a "majority of [its] sister courts." Pet. App. 14. But the issue those courts considered was whether a private party has standing to claim that federal law directs or interferes with the activities of the State or state officials in a manner that intrudes on state sovereignty, not whether a private party has standing to challenge a statute directly regulating her conduct as exceeding Congress's enumerated powers. In the decisions relied upon by the court below, the courts held that claims that Congress commandeered state officials or otherwise interfered with a specific aspect of state sovereignty should be advanced by the States themselves, rather than by private parties.[16] In none of those deci-

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which confers a privilege,'" an inquiry which "goes to the merits," whereas the Court's modern standing doctrine focuses on whether the litigant has alleged a concrete and particularized injury that would be redressed by a favorable decision, without regard to the likely success of that claim. *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153-154 (1970) (quoting *TVA*, 306 U.S. at 137-138).

[16] See, *e.g.*, *United States* v. *Hacker*, 565 F.3d 522, 524, 525-527 (8th Cir.) (finding that a criminal defendant lacked standing to raise the claim that sex offender registration law "violated the Tenth Amendment by compelling states to accept registrations from a federally mandated sex-offender program"), cert. denied, 130 S. Ct. 302 (2009); *Oregon* v. *Legal Servs. Corp.*, 552 F.3d 965, 972-973 (9th Cir. 2009) (remarking that "[o]nly States have standing to pursue claims alleging violations of the Tenth Amendment by the federal government," but then concluding that the State lacked standing because the injury claimed was to the State's citizens and the State "has no independent claim of injury"); *Brooklyn Legal Servs. Corp.* v. *Legal Servs. Corp.*, 462 F.3d 219, 234-235 (2d Cir. 2006) (finding no standing for a private party to assert a Tenth Amendment claim that federal restrictions "intruded unacceptably on state sovereignty" by "interfer[ing] with the states' ability to fund legal assistance programs * * * and perform important

sions did a court of appeals rely on *TVA* to deny a criminal defendant standing to raise an enumerated-powers challenge to his conviction.

Relying on this Court's characterization of Congress's enumerated powers and the Tenth Amendment as "mirror images" of one another, petitioner suggests (Pet. Reply 9) that there is no relevant difference between enumerated-powers claims and interference-with-sovereignty claims for standing purposes. She is mistaken. The Court's "mirror image" language does not equate the two types of claims. Instead, it simply restates the "truism" that any powers not delegated to the federal government are retained by the States. *New York*, 505 U.S. at 156 (quoting *United States* v. *Darby*, 312 U.S. 100, 124 (1941)). This Court has explained that even when Congress acts within its enumerated powers, the Tenth Amendment precludes it from exercising its authority in certain ways, *i.e.*, by commandeering state

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functions on behalf of state judicial systems"), cert. denied, 552 U.S. 810 (2007); *Medeiros* v. *Vincent*, 431 F.3d 25, 28-29, 33-36 (1st Cir. 2005) (private party lacked standing to claim that an interstate fishery management plan "constitute[d] an unlawful 'commandeering' of Rhode Island's legislative prerogatives under the Tenth Amendment"); *United States* v. *Parker*, 362 F.3d 1279, 1284-1285 (10th Cir.) (no standing for a private party to claim that use of the Assimilative Crimes Act to prosecute state-defined gun offenses in federal court "violates the Tenth Amendment because it interferes with the state's Second Amendment powers"), cert. denied, 543 U.S. 874 (2004).

Some courts nevertheless have found standing for individuals to raise claims alleging that Congress impermissibly commandeered state officials or otherwise interfered with a specific aspect of state sovereignty. See, *e.g.*, *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 703-704 (7th Cir. 1999) (individual has standing to contend that 18 U.S.C. 922(g)(9) impermissibly compels state officers to implement a federal program), cert. denied, 528 U.S. 1116 (2000).

legislative and executive officials. See *Condon*, 528 U.S. at 149.

Indeed, this Court and the courts of appeals have distinguished between the two types of Tenth Amendment claims for standing purposes. In *Pierce County*, *supra*, this Court granted certiorari to address two questions: (1) whether 23 U.S.C. 409, which protects certain documents compiled or collected in connection with federal highway safety programs from being discovered or admitted in federal or state trials, is a valid exercise of Congress's Article I authority; and (2) whether "private plaintiffs have standing to assert 'states' rights' under the Tenth Amendment where their State's Legislative and Executive branches expressly approve and accept the benefits and terms of the federal statute in question." Pet. at i, *Pierce County*, *supra* (No. 01-1229); see 535 U.S. 1033 (2002) (granting the petition for a writ of certiorari).

The Court decided the first question on the merits, finding that the statute was a proper exercise of Congress's Commerce Clause power, without suggesting that the private party bringing the claim lacked standing. *Pierce County*, 537 U.S. at 146-148. On the second question presented, the private party had contended that the statute violated the Tenth Amendment by "prohibit[ing] a State from exercising its sovereign powers to establish discovery and admissibility rules to be used in state court for a state cause of action." *Id.* at 148 n.10. But the court below had failed to address that argument, because it "reason[ed] instead that the [statute] was beyond Congress' enumerated powers." *Ibid.* This Court therefore declined to address the standing question in the first instance. In so holding, the Court necessarily recognized that the standing question was

relevant only to the interference-with-sovereignty claim and not the private party's claim regarding the scope of Congress's Article I authority.

Similarly, in *United States* v. *Shenandoah*, 595 F.3d 151 (3d Cir.), cert. denied, 130 S. Ct. 3433 (2010), a criminal defendant challenged the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.* (SORNA), as both exceeding Congress's Article I authority and commandeering state officials in violation of the Tenth Amendment. *Id.* at 156, 161-162. Analyzing the two claims separately, the court of appeals first rejected on the merits the defendant's contention that SORNA "exceeded [Congress's] commerce clause authority," *id.* at 160, without any suggestion that the defendant lacked standing to make that claim. The court then held that the defendant lacked standing to raise his second claim, *i.e.*, that SORNA "compels New York law enforcement to accept registrations from federally-mandated sex offender programs in violation of the Tenth Amendment." *Id.* at 161. See also, *e.g.*, *United States* v. *Hacker*, 565 F.3d 522, 524-527 (8th Cir.) (adjudicating a Commerce Clause challenge to SORNA on the merits but holding that the individual lacked standing to argue that SORNA "violated the Tenth Amendment by compelling states to accept [sex offender] registrations"), cert. denied, 130 S. Ct. 302 (2009). These decisions reflect the common-sense recognition that whether a private party has standing to bring a claim implicating Tenth Amendment rights depends on whether the claim seeks to vindicate the rights of that party or of the State.

4. Because petitioner does not raise a Tenth Amendment challenge premised on a claim that Congress commandeered state officials or otherwise interfered with a

specific aspect of state sovereignty, this Court need not address whether only States may bring such challenges. The *TVA* Court already has answered that question, however, and the rule it announced is correct: Private parties generally lack standing to raise claims that a federal statute violates the Tenth Amendment by commandeering a State or its officials or otherwise interfering with a specific aspect of state sovereignty. This rule is consistent with the decisions of this Court since *TVA*, in which such claims have been raised exclusively by States or state officials.[17]

First, if a private party asserts an injury from an alleged federal commandeering of state officials or other interference with a specific aspect of state sovereignty, the redressability of such an injury may well depend on the State's actions. Although the federal government "cannot compel the States to enact or enforce a federal regulatory program," *Printz*, 521 U.S. at 935, States are free to implement federal law voluntarily, see *id.* at 936 (O'Connor, J., concurring) ("Our holding, of course, does not spell the end of the objectives of the Brady Act. States and chief law enforcement officers may volun-

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[17] See, *e.g.*, *Condon*, 528 U.S. at 147 (suit brought by State and its Attorney General); *Printz*, 521 U.S. at 904 (suit brought by county law enforcement officers); *New York*, 505 U.S. at 153 (suit brought by the State and two counties); *Gregory* v. *Ashcroft*, 501 U.S. 452, 456 (1991) (suit brought by state judges).

Prior to *TVA*, the Court in *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), addressed on the merits a private company's claims that portions of the Social Security Act exceeded Congress's Article I authority and that "the states in submitting to it have yielded to coercion" by the federal government. *Id.* at 578. The Court did not address the question of standing, and its discussion of the merits did not clearly distinguish between the private company's enumerated-powers claim and its claim of state coercion. See *id.* at 578-597.

tarily continue to participate in the federal program."); see also *New York*, 505 U.S. at 166-167.

Second, even if a private party could establish a particularized and redressable injury as a result of alleged federal commandeering of state officials or interference with a specific aspect of state sovereignty, prudential standing considerations would bar consideration of the claim because the claim is premised on the rights of a third party—the State. The *TVA* rule reflects the general principle that a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights of third parties." *Warth*, 422 U.S. at 499. It also allows the courts to avoid adjudicating "rights which those not before the Court may not wish to assert" and to ensure "that the most effective advocate of the rights at issue is present to champion them." *Duke Power Co.*, 438 U.S. at 80; see, *e.g.*, *Hacker*, 565 F.3d at 524, 527.

Relying on this Court's statement in *New York* that the Tenth Amendment "ultimately secures the rights of individuals" (505 U.S. at 181), petitioner suggests (Pet. Reply 9-10) that "[p]rivate citizens have standing to raise Tenth Amendment claims when the federal government exceeds its proper sphere of authority." She is mistaken. *New York* did not address private-party standing, and the quoted language addressed whether state officials' prior consent to a Tenth Amendment violation precludes state officials from later claiming such a violation. 505 U.S. at 181-183. The Court determined that a State could bring a Tenth Amendment challenge notwithstanding its prior consent because the Constitution "divides authority between federal and state governments for the protection of individuals," not for the benefit of States. *Id.* at 181-182. But it does not follow

that private citizens may sue to assert a State's rights; citizens generally must rely on their elected officials to determine which claims to pursue for the benefit of the citizenry. See *Heckler* v. *Chaney*, 470 U.S. 821, 831-833 (1985). Indeed, allowing private parties to bring Tenth Amendment interference-with-sovereignty challenges would infringe the sovereignty of the affected States by permitting individual citizens, rather than state officials, to set state policy and to invoke the power of federal courts in ways that may be adverse to a State's interests. Accordingly, only a State has standing to raise such challenges under the Tenth Amendment.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

1. Section 8 of Article I of the United States Constitution provides:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in

the Government of the United States, or in any Department or Officer thereof.

2. Section 2 of Article II of the United States Constitution provides, in pertinent part:

The President * * * shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur * * *

3. The Tenth Amendment to the United States Constitution provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

4. 18 U.S.C. 229 provides:

Prohibited activities

(a) UNLAWFUL CONDUCT.—Except as provided in subsection (b), it shall be unlawful for any person knowingly—

(1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; or

(2) to assist or induce, in any way, any person to violate paragraph (1), or to attempt or conspire to violate paragraph (1).

(b) EXEMPTED AGENCIES AND PERSONS.—

(1) IN GENERAL.—Subsection (a) does not apply to the retention, ownership, possession, transfer, or receipt of a chemical weapon by a department, agency, or other entity of the United States, or by a person described in paragraph (2), pending destruction of the weapon.

(2) EXEMPTED PERSONS.—A person referred to in paragraph (1) is—

(A) any person, including a member of the Armed Forces of the United States, who is authorized by law or by an appropriate officer of the United States to retain, own, possess, transfer, or receive the chemical weapon; or

(B) in an emergency situation, any otherwise nonculpable person if the person is attempting to destroy or seize the weapon.

(c) JURISDICTION.—Conduct prohibited by subsection (a) is within the jurisdiction of the United States if the prohibited conduct—

(1) takes place in the United States;

(2) takes place outside of the United States and is committed by a national of the United States;

(3) is committed against a national of the United States while the national is outside the United States; or

(4) is committed against any property that is owned, leased, or used by the United States or by any department or agency of the United States,

whether the property is within or outside the United States.

5. 18 U.S.C. 229A provides:

Penalties

(a) CRIMINAL PENALTIES.—

(1) IN GENERAL.—Any person who violates section 229 of this title shall be fined under this title, or imprisoned for any term of years, or both.

(2) DEATH PENALTY.—Any person who violates section 229 of this title and by whose action the death of another person is the result shall be punished by death or imprisoned for life.

(b) CIVIL PENALTIES.—

(1) IN GENERAL.—The Attorney General may bring a civil action in the appropriate United States district court against any person who violates section 229 of this title and, upon proof of such violation by a preponderance of the evidence, such person shall be subject to pay a civil penalty in an amount not to exceed $100,000 for each such violation.

(2) RELATION TO OTHER PROCEEDINGS.—The imposition of a civil penalty under this subsection does not preclude any other criminal or civil statutory, common law, or administrative remedy, which is available by law to the United States or any other person.

(c) REIMBURSEMENT OF COSTS.—The court shall order any person convicted of an offense under sub-

section (a) to reimburse the United States for any expenses incurred by the United States incident to the seizure, storage, handling, transportation, and destruction or other disposition of any property that was seized in connection with an investigation of the commission of the offense by that person. A person ordered to reimburse the United States for expenses under this subsection shall be jointly and severally liable for such expenses with each other person, if any, who is ordered under this subsection to reimburse the United States for the same expenses.

6. 18 U.S.C. 229F provides:

Definitions

In this chapter:

(1) CHEMICAL WEAPON.—The term "chemical weapon" means the following, together or separately:

(A) A toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose.

(B) A munition or device, specifically designed to cause death or other harm through toxic properties of those toxic chemicals specified in subparagraph (A), which would be released as a result of the employment of such munition or device.

(C) Any equipment specifically designed for use directly in connection with the employment of munitions or devices specified in subparagraph (B).

(2) CHEMICAL WEAPONS CONVENTION; CONVENTION.—The terms "Chemical Weapons Convention" and "Convention" mean the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993.

(3) KEY COMPONENT OF A BINARY OR MULTICOMPONENT CHEMICAL SYSTEM.—The term "key component of a binary or multicomponent chemical system" means the precursor which plays the most important role in determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multicomponent system.

(4) NATIONAL OF THE UNITED STATES.—The term "national of the United States" has the same meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

(5) PERSON.—The term "person", except as otherwise provided, means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, any State or any political subdivision thereof, or any political entity within a State, any foreign government or nation or any agency, instrumentality or political subdivision of any such government or nation, or other entity located in the United States.

(6) PRECURSOR.—

(A) IN GENERAL.—The term "precursor" means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. The term includes any key component of a binary or multicomponent chemical system.

(B) LIST OF PRECURSORS.—Precursors which have been identified for the application of verification measures under Article VI of the Convention are listed in schedules contained in the Annex on Chemicals of the Chemical Weapons Convention.

(7) PURPOSES NOT PROHIBITED BY THIS CHAPTER.—The term "purposes not prohibited by this chapter" means the following:

(A) PEACEFUL PURPOSES.—Any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.

(B) PROTECTIVE PURPOSES.—Any purpose directly related to protection against toxic chemicals and to protection against chemical weapons.

(C) UNRELATED MILITARY PURPOSES.—Any military purpose of the United States that is not connected with the use of a chemical weapon or that is not dependent on the use of the toxic or poisonous properties of the chemical weapon to cause death or other harm.

(D) LAW ENFORCEMENT PURPOSES.—Any law enforcement purpose, including any domestic riot control purpose and including imposition of capital punishment.

(8) TOXIC CHEMICAL.—

(A) IN GENERAL.—The term "toxic chemical" means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production,

and regardless of whether they are produced in facilities, in munitions or elsewhere.

(B) LIST OF TOXIC CHEMICALS.—Toxic chemicals which have been identified for the application of verification measures under Article VI of the Convention are listed in schedules contained in the Annex on Chemicals of the Chemical Weapons Convention.

(9) UNITED STATES.—The term "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States and includes all places under the jurisdiction or control of the United States, including—

(A) any of the places within the provisions of paragraph (41) of section 40102 of Title 49, United States Code;

(B) any civil aircraft of the United States or public aircraft, as such terms are defined in paragraphs (17) and (37), respectively, of section 40102 of title 49, United States Code; and

(C) any vessel of the United States, as such term is defined in section 70502(b) of title 46, United States Code.

REPLY BRIEF

Supreme Court, U.S.
FILED
FEB 9 - 2011
OFFICE OF THE CLERK

No. 09-1227

In the Supreme Court of the United States

CAROL ANNE BOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES SUPPORTING PETITIONER

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The question in this case is whether petitioner, a criminal defendant convicted under 18 U.S.C. 229, has standing to argue that Congress exceeded its Article I authority in enacting that statute. The answer is yes. And that answer can be reached without resolving many of the provocative questions raised by petitioner and the court-appointed amicus.

No one disputes that petitioner has Article III standing to raise her claim. Petitioner's conviction and sentence constitute a concrete and particularized injury, directly traceable to the government's prosecution of her under Section 229, and a decision in her favor would redress her injury.

The amicus appointed to defend the judgment below, however, contends that petitioner should be denied standing on prudential grounds. In his view, petitioner raises a

Tenth Amendment claim of intrusion on rights of the States, and such a claim is barred by *Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118 (1939). Amicus is correct that *TVA* reflects the long-recognized prudential limitation on third-party standing. Amicus also is correct that although this Court's standing and Tenth Amendment doctrines have evolved since *TVA*, the prudential standing principle underlying *TVA* is fully consistent with this Court's modern standing jurisprudence.

The court-appointed amicus errs, however, in contending that the prudential limitation on third-party standing bars petitioner's claim. Amicus contends that challenges to statutes implementing treaties are unique, because any claim that Congress exceeded its Article I authority in implementing a treaty must fail on the merits under *Missouri* v. *Holland*, 252 U.S. 416 (1920). Amicus therefore concludes that, because petitioner cannot challenge Congress's authority to enact Section 229, she instead must be arguing that the Tenth Amendment places external limits on Congress's ability to implement treaties.

This Court should reject amicus's characterization of petitioner's argument and the conclusion amicus draws. As an initial matter, Congress's authority to implement treaties is not the only source of authority supporting Section 229 — the statute is easily and independently justified as an exercise of the Commerce Clause authority—and thus courts can resolve petitioner's challenge to Section 229 without considering any of amicus's arguments about the uniqueness of statutes that implement treaties. In any event, amicus incorrectly characterizes petitioner's treaty-based argument. Petitioner has never questioned the validity of the Chemical Weapons Convention, only Congress's implementation of it.

Moreover, contrary to amicus's view of the Tenth Amendment aspect of petitioner's claim, petitioner has argued throughout this litigation that Congress lacks the Article I authority to enact Section 229, and, for that reason alone, Section 229 intrudes on areas reserved to the States. Petitioner has not argued that, although Congress has the authority to enact Section 229, the statute nonetheless improperly commandeers state officials or otherwise regulates core aspects of state sovereignty. Because petitioner is raising her own claim, not the claim of an absent State, the prudential third-party standing barrier is not at issue. *TVA*'s standing limitation is therefore not implicated here, and the Court need not reconsider it.

Aside from the decision below, the government is not aware of any decision by this Court or a federal appellate court holding that a criminal defendant lacks standing to argue that Congress exceeded its Article I authority in enacting the statute under which she was convicted. Prudential principles should not be utilized to deny petitioner standing here.

Finally, the court-appointed amicus suggests that petitioner's claim raises a non-justiciable political question: a challenge to the exercise of the Treaty Power. That issue need not be addressed in order to resolve the standing issue before the Court, and no court may need to address it if the statute can be upheld on other constitutional grounds. In any event, petitioner's claim does not implicate a non-justiciable political question. Her assertion that Section 229 exceeds Congress's authority mirrors the type of claim already considered in *Missouri* v. *Holland*, *supra*, and is analogous to Article I challenges routinely adjudicated by the courts. Other, direct challenges to the treaty-making process may well raise political questions that are not suitable for judicial determination. But this case provides no

occasion to consider such claims, because petitioner does not challenge the validity of the Chemical Weapons Convention itself or any other exercise of foreign-affairs powers.

A. The Only Disputed Issue Is The Prudential Limitation On Third-Party Standing

1. This case should be resolved using ordinary standing principles. Under those principles, a litigant must demonstrate that she meets the irreducible constitutional minimum to establish Article III standing (injury in fact, causation, and redressability), and her claim must not be barred by prudential considerations (such as the limitations on third-party standing and the adjudication of generalized grievances). See, *e.g.*, *Massachusetts* v. *EPA*, 549 U.S. 497, 517 (2007); *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004); see also U.S. Br. 21-25.

Contrary to petitioner's repeated suggestion (Br. 16, 17, 20, 21, 22, 27, 28, 29), the United States does not suggest that the Court use any special standing rules to resolve this case. As explained previously (U.S. Br. 20-21), standing to raise a Tenth Amendment claim turns on settled Article III and prudential standing principles. Although those principles may lead to different conclusions for different types of Tenth Amendment claims, see *ibid.*, that does not mean that the legal standard differs from claim to claim.

2. The parties and the court-appointed amicus agree that petitioner satisfies the Article III requirements for establishing standing to challenge her conviction under 18 U.S.C. 229. Pet. Br. 14-15; U.S. Br. 22-23; Amicus Br. 14. Petitioner's criminal conviction constitutes an injury in fact; that injury is directly traceable to the government's prosecution of her under Section 229; and that injury would be redressed if a court accepted her argument that Section

229 is unconstitutional. See U.S. Br. 22-23; see also, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

Indeed, it is difficult to imagine a situation in which "[a]n incarcerated convict's * * * challenge to the validity of h[er] conviction" would not "satisf[y] the case-or-controversy requirement, because the incarceration * * * constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction." *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998). Accordingly, the only issue in this case is whether petitioner should be precluded from challenging her conviction for prudential reasons.

3. The court-appointed amicus contends (Br. 14-15) that petitioner lacks standing because of the "prudential doctrine that generally prohibits third parties from asserting the legal rights of others." Invoking *Tennessee Electric Power Co.* v. *TVA*, *supra*, amicus contends that petitioner challenges Section 229 on the ground that it intrudes on the rights of States in violation of the Tenth Amendment, and the States, not petitioner, should bring that claim. Amicus Br. 14-47. The court-appointed amicus is correct that this Court's decision in *TVA* reflects the prudential limitation on third-party standing. But amicus errs in concluding that petitioner is asserting third-party rights, rather than her own rights. Petitioner's claim is that Congress exceeded its authority in enacting Section 229, a statute that directly regulates her own conduct, not that Congress has impermissibly intruded on state sovereign affairs.

B. *TVA* Reflects The Prudential Limitation On Third-Party Standing

1. As the court-appointed amicus correctly explains (Br. 16-18), *TVA* reflects the "modern prohibition on third-party standing." In that case, private utility companies

challenged the TVA's sale of electricity to municipalities and cooperatives with stipulated resale rates. One of the utilities' claims was that, even if Congress had the authority to create the TVA, the TVA's rate-setting impermissibly intruded on state prerogatives by regulating "purely local matters reserved to the states or the people by the Tenth Amendment." 306 U.S. at 143; see *id.* at 136, 140-142. This Court not only rejected the claim by stating that TVA's competition did not amount to regulation; it also held that the utilities "have no standing in this suit to raise any question under the [Tenth] [A]mendment," because the States had not joined the lawsuit or even "object[ed] to the [TVA's] operations." *Id.* at 144. See *Tennessee Elec. Power Co.* v. *TVA*, 21 F. Supp. 947, 960 (E.D. Tenn. 1938) (district court's holding that "[q]uestions of the conflict of the TVA statute with the sovereign power of the states are not properly raised until the interested parties are before the court"), aff'd, 306 U.S. 118 (1939); see also U.S. Br. 33-35.

The *TVA* Court signaled that its Tenth Amendment standing holding followed from the principle that a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). To support its holding, the Court invited comparison to *Georgia Power Co.* v. *TVA*, 14 F. Supp. 673, 676 (N.D. Ga. 1936), in which the district court rejected a utility's objection to the location of TVA's power lines, on the ground that the State had not consented, by saying: "But Georgia is not objecting, and the Georgia Power Company cannot object for it." See *TVA*, 306 U.S. at 144 n.27. The limitation on third-party standing was well-established by the time of the Court's decision in *TVA*. See, *e.g.*, *Heald* v. *District of Columbia*, 259 U.S. 114, 122 (1922); *Blair* v. *United States*, 250 U.S. 273, 279 (1919); *People of State of*

New York ex rel. Hatch v. *Reardon*, 204 U.S. 152, 160-161 (1907); *Davis & Farnum Mfg. Co.* v. *City of Los Angeles*, 189 U.S. 207, 218-219 (1903).

2. The prudential limitation on third-party standing does not apply to petitioner's claim. As explained (U.S. Br. 14-16), Tenth Amendment claims come in two forms: (1) claims that Congress exceeded its constitutional authority in enacting a certain statute, thereby intruding on the areas reserved to the States, see, *e.g.*, *United States* v. *Comstock*, 130 S. Ct. 1949 (2010); *Gonzales* v. *Raich*, 545 U.S. 1 (2005); *Sabri* v. *United States*, 541 U.S. 600 (2004); *United States* v. *Lopez*, 514 U.S. 549 (1995), and (2) claims that, even though Congress concededly has the authority to regulate in a certain area, Congress has directly regulated the States in a manner that impermissibly intrudes on state sovereignty in violation of the Tenth Amendment, see, *e.g.*, *Printz* v. *United States*, 521 U.S. 898 (1997); *New York* v. *United States*, 505 U.S. 144 (1992). Several decisions of this Court reflect that distinction. See, *e.g.*, *McConnell* v. *FEC*, 540 U.S. 93, 186-187 (2003), overruled in part on other grounds by *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010); *Pierce County* v. *Guillen*, 537 U.S. 129, 146-148 (2003); *Reno* v. *Condon*, 528 U.S. 141, 149-150 (2000).[1]

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[1] The court-appointed amicus appears to accept this distinction. Amicus Br. 27-29. Petitioner would not distinguish (Br. 27-29) between different types of Tenth Amendment claims, instead urging that private parties have standing to raise any claim that invokes the Tenth Amendment. But courts must assess standing with a "careful" analysis of "the particular claim[] asserted." *Allen* v. *Wright*, 468 U.S. 737, 752 (1984). The invocation of the words "Tenth Amendment" does not make all claims alike. Nor does this Court's statement in *New York* v. *United States* that the Tenth Amendment ultimately "protect[s] the sovereignty of States * * * for the protection of individuals," 505 U.S. at 181, establish that individuals, as opposed to States, are the appropriate parties to raise any and all Tenth Amendment claims. See U.S. Br. 44-

In *TVA*, the essence of the utilities' Tenth Amendment claim was that Congress had impermissibly regulated the States' "internal affairs" by "substituting federal regulation for state regulation" of electricity rates. 306 U.S. at 135-136, 140-143. Because the utilities asserted usurpation of state authority, and the States had not objected, the Court concluded that the utilities lacked standing to bring the claim. *Id.* at 144.[2] Significantly, the Court distinguished between what it perceived as the utilities' state-sovereignty claim, which it rejected on the merits and on standing grounds, and the utilities' argument that Congress lacked the Article I authority to create the TVA in the first place, which it separately rejected by holding that utilities could not claim damage from otherwise-lawful competition. *TVA*, 306 U.S. at 136-140; see U.S. Br. 35.

Because the Court understood the utilities' Tenth Amendment claim to be premised on the rights of the States, rather than of the utilities themselves, the Court found that claim barred by third-party standing limitations. See U.S. Br. 44; Amicus Br. 17 (citing U.S. Br. in Opp. at 13, *Medeiros* v. *Sullivan*, 548 U.S. 904 (2006) (No. 05-1243) (reaching same conclusion)). That reasoning accords with

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45 (observing that *New York*'s language addresses different issue of prior state acquiescence). In any event, all the Court need decide in this case is that petitioner has standing to raise her specific Tenth Amendment claim, which asserts that Congress exceeded its enumerated powers in enacting Section 229.

[2] Petitioner's claim differs from the utilities' claim in *TVA* in that Section 229 does not even arguably prevent the States from regulating petitioner's conduct. Instead, Section 229 vindicates the United States' sovereign interests while leaving the sovereign interests of the States intact. Cf. *Heath* v. *Alabama*, 474 U.S. 82, 89 (1985) ("Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty." (internal quotation marks omitted)).

the Court's post-*TVA* Tenth Amendment decisions, which have entertained claims of commandeering or other asserted intrusions on a specific aspect of state sovereignty only at the behest of States or state officials. See U.S. Br. 43 n.17 (citing cases).[3] And it makes sense: a claim that a State was commandeered, for example, must rest on a state objection to the assertedly invalid federal command; States and their officers may "voluntarily * * * participate in the federal program." *Printz*, 521 U.S. at 936 (O'Connor, J., concurring). A state objection, therefore, is crucial to the claim. Indeed, allowing private parties to assert claims on behalf of absent States itself would infringe the sovereignty of the States. See Amicus Br. 21; U.S. Br. 45.

3. Petitioner contends (Br. 17-27) that *TVA* should be limited or overruled. As an initial matter, this Court need not decide whether to limit or overrule *TVA*, because petitioner raises a fundamentally different type of Tenth

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[3] Contrary to petitioner's contention (Br. 20-21), the Court's standing holding in *TVA* is consistent with its earlier decisions. In *Helvering* v. *Davis*, 301 U.S. 619 (1937), the Court considered whether Congress had the authority to enact certain provisions in the Social Security Act, *id.* at 638-645; the Court held (without addressing standing) that those provisions were supported by Congress's Article I, § 8, Spending Clause power, *id.* at 640-645. The shareholder who brought suit in *Helvering* raised only an enumerated-powers Tenth Amendment argument; he did not contend that the Social Security Act impermissibly regulated the States. In *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), the Court considered the arguments that a different portion of the Social Security Act impermissibly exceeded Congress's Article I authority and that "the states in submitting to it have yielded to [federal] coercion." *Id.* at 578. The Court considered these claims on the merits, but did not clearly distinguish between the private company's enumerated-powers claim and its claim of state coercion. See *id.* at 578-597; see also U.S. Br. 43 n.17. In neither *Helvering* nor *Steward Machine* did the Court hold that a private party may raise a claim of intrusion on a specific aspect of state sovereignty in violation of the Tenth Amendment.

Amendment claim than the one at issue in *TVA*: petitioner argues that Congress exceeded its authority in regulating her conduct in enacting Section 229, while *TVA* concerned a claim that Congress impermissibly usurped sovereign activities of the States. See U.S. Br. 36-38; see also pp. 11-13, *infra*.

While it is not at issue here, the third-party standing conclusion in *TVA* is not dicta, as petitioner contends (Br. 19). The *TVA* Court expressly rejected the utilities' Tenth Amendment claim on two alternative grounds—that "the sale of government property in competition with others is not a violation of the Tenth Amendment" and that the utilities "have no standing" to raise that claim. 306 U.S. at 144. "[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*." *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

In petitioner's view (Br. 19-20), the Court's statement that the utilities, "absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] [A]mendment," 306 U.S. at 144, simply "rejects the argument that, at least absent state participation, there would be any special rule allowing the Ninth and Tenth Amendment claims to go forward when the Fifth Amendment claims would not." Pet. Br. 19-20. But *TVA*'s key sentence did not distinguish between Fifth Amendment claims on the one hand, and Ninth and Tenth Amendment claims on the other; it referred specifically to Tenth Amendment claims and said that the utilities "have no standing" to raise them absent the States. 306 U.S. at 144.

4. It is true that this Court's standing jurisprudence has evolved since *TVA*. At the time of *TVA*, a litigant's standing required the invasion of a legally protected interest, a showing that "goes to the merits" and that is no longer required. See *Association of Data Processing Serv.*

Orgs., Inc. v. *Camp*, 397 U.S. 150, 153-154 (1970) (citing *TVA*, 306 U.S. at 137-138); see also U.S. Br. 38 n.15. But *TVA*'s standing holding independently reflects the prudential limitation on third-party standing. That limitation remains an important part of this Court's standing jurisprudence. See, *e.g.*, *Newdow*, 542 U.S. at 12; *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978).

Furthermore, since *TVA*, the Court has limited the types of intrusions on state sovereignty that violate the Tenth Amendment. See, *e.g.*, *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Today, the alleged Tenth Amendment claim in *TVA* (that the federal government impermissibly displaced state authority to regulate electric power rates) would not state a valid Tenth Amendment claim. But that is a distinct question on the merits from whether private parties have prudential standing to raise claims that Congress's regulation of the States intrudes on a specific aspect of state sovereignty in violation of the Tenth Amendment.

Accordingly, whether petitioner has standing in this case depends on whether she is arguing that Congress exceeded its enumerated powers by regulating her conduct under Section 229, as opposed to arguing that Section 229 regulates States in a manner that impermissibly intrudes on a specific aspect of state sovereignty.

C. Petitioner Has Standing Because She Is Not Asserting A Third-Party Claim

1. Petitioner's contention throughout this litigation has been that Congress exceeded its authority in regulating her conduct under Section 229; she has not argued that Section 229 impermissibly regulates the activities of States. In the district court, petitioner noted that "[e]very law enacted by

Congress must be based on one or more of its powers enumerated in the Constitution," C.A. App. 52 (quoting *United States* v. *Morrison*, 529 U.S. 598, 606 (2000)), and she argued that Section 229 "does not represent a valid exercise of federal authority under the Commerce Clause, the Treaty Power, or other potential authority in the United States Constitution," *id.* at 46. While she asserted that Section 229 intruded into a "state-regulated domain," *id.* at 59, that followed from her view that the statute was invalid unless "it is based on a valid exercise of constitutional authority and * * * requires proof of a federal interest," *id.* at 58. She never mentioned the Tenth Amendment.

In the court of appeals, petitioner again argued that "[t]he Constitution creates a Federal Government of enumerated powers" and that Section 229 is not "based on a valid exercise of constitutional authority." Pet. C.A. Br. 9-10; see *id.* at 17 ("The essential question before this Court is whether the federal government can utilize international treaties to enact criminal legislation addressing subjects that are otherwise beyond Congress's legislative powers."). Petitioner's appellate brief did not cite the Tenth Amendment at all.

On petition for rehearing en banc, petitioner stated that her "main argument" is that "Congress acted outside of its enumerated powers, thereby violating other provisions of the Constitution" and that her "Tenth Amendment argument" was "ancillary" to that claim. Pet. for Reh'g En Banc 6. Petitioner gave only one reason why Section 229 violates the Tenth Amendment: "the States did not delegate to Congress the power to enact this statute." *Id.* at 5-6.

Petitioner's opening brief in this Court confirms that her Tenth Amendment argument is an enumerated-powers challenge. Petitioner characterizes her claim as a "Tenth Amendment claim[] challenging a federal statute as in ex-

cess of Congress's enumerated powers." Pet. Br. 16 (title; capitalization omitted). She defines the ultimate dispute in this case as a disagreement about "the scope of Congress's authority under the Necessary and Proper Clause * * * to effectuate the federal treaty power" and the continuing vitality of *Missouri* v. *Holland*, *supra*, which concerned the limits on Congress's authority to implement treaties. Pet. Br. 12-13, 38-39. Petitioner consistently focuses on the Article I authority of Congress to enact Section 229, see, *e.g.*, *id.* at 12-13, 27, 32, 37-40, and she has raised no other Tenth Amendment challenge to Section 229.

2. According to the court-appointed amicus, petitioner is arguing that "18 U.S.C. § 229 violates the interests of the States, expressly relying on the Tenth Amendment as a limitation on the Treaty Power." Amicus Br. 31. In amicus's view, "standing to challenge exercises of the Treaty Power is more limited than in the Article I, § 8 context" because, under *Missouri* v. *Holland*, *supra*, "there can be no valid claim that the Article I, § 8 enumerated powers of Congress limit the scope of the federal government's exclusive Treaty Power." Amicus Br. 42, 47. Thus, amicus concludes, petitioner's claim must concern only the external limits the Tenth Amendment imposes on legislation Congress concededly has the authority to enact, rather than the question whether Congress had the authority to enact Section 229 in the first place. *Id.* at 46-47. Amicus is mistaken. Petitioner's challenge throughout this litigation has focused on Congress's authority to enact Section 229 to regulate her, not on any impermissible regulation of the States, see pp. 11-13, *supra*, and Section 229's implementation of a treaty does not change that.

a. As an initial matter, petitioner's challenge to Section 229 could be resolved without addressing amicus's arguments about the uniqueness of the Treaty Power, because

the statute is a valid exercise of Congress's Commerce Clause power, combined with its Necessary and Proper Clause power. Although Congress enacted Section 229 in order to implement its treaty obligations under the Chemical Weapons Convention, "[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948).[4]

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[4] Although the government stated to the district court that "Section 229 was not enacted under the interstate commerce authority but under Congress's authority to implement treaties," Gov't Resp. to Mot. to Dismiss Indictment 7, 2:07-CR-528 Docket entry No. 30 (E.D. Pa. Nov. 13, 2008), that statement of what power Congress actually invoked at the time does not mean that other bases of authority beyond those actually invoked are unavailable to defend the statute. A court may, regardless of the government's concession, uphold the statute as a valid exercise of the Commerce Clause power as part of its obligation "to afford congressional enactments the benefit of all reasonable arguments in favor of constitutionality." *United States* v. *Engler*, 806 F.2d 425, 433 (3d Cir. 1986) (court determined that it was "not bound by the government's concession"); *see Heller* v. *Doe*, 509 U.S. 312, 320-321 (1993) ("A statute is presumed constitutional * * * and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" (quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)) (brackets in original)). In fact, the district court in this case suggested (without deciding) that the Commerce Clause might justify 18 U.S.C. 229. C.A. App. 100.

Because nothing precludes treaty-implementing legislation from drawing on multiple sources of authority, *e.g.*, *United States* v. *Shi*, 525 F.3d 709, 721 (9th Cir.), cert. denied, 129 S. Ct. 324 (2008), and because the Commerce Clause argument presents a pure issue of law if the case is remanded, the court of appeals should consider it as an alternative basis for upholding Section 229 in this case. See *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970) ("A prevailing party may * * * assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the

Section 229 makes it unlawful for any person knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. 229(a)(1). As this Court explained in *Gonzales* v. *Raich*, 545 U.S. 1 (2005), "[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product." *Id.* at 26. To illustrate this point, the Court cited a series of criminal statutes that are materially indistinguishable from Section 229. *Id.* at 26 n.36. Those statutes include 18 U.S.C. 175(a), the statute that implements the Biological Weapons Convention by making it unlawful to "knowingly develop[], produce[], stockpile[], transfer[], acquire[], retain[], or possess[] any biological agent, toxin, or delivery system for use as a weapon"; 18 U.S.C. 831, the statute that implements the Convention on the Physical Protection of Nuclear Material by imposing similar prohibitions with respect to nuclear material; and 18 U.S.C. 842(n)(1), the statute implementing the Plastic Explosives Convention by making it unlawful "to ship, transport, transfer, receive, or possess any plastic explosive that does not contain a detection agent."[5]

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trial court."). Precluding its consideration because of the government's failure to raise it below would be especially unwarranted if the court of appeals therefore had to "wade into" what it regarded as difficult constitutional issues under *Missouri* v. *Holland*. Pet. App. 10 & n.4. And equally unwarranted would be the constitutional invalidation of a statute in petitioner's case alone based on an incomplete analysis, even if a valid basis would sustain the statute for everyone else.

[5] See Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *opened for signature* Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163; Convention on the Physical Protection of Nuclear Material, *opened for signature* Mar. 3, 1980, T.I.A.S. No. 11,080, 1456

Raich's citation of these statutes makes clear that Congress may regulate the intrastate possession, manufacture, and distribution of these weapons as part of its regulation of the interstate market, just as Congress validly placed similar restrictions on homegrown marijuana. See 545 U.S. at 16-22. The same is true for the chemical weapons regulated by Section 229. Section 229, like the statute in *Raich*, is part of a "comprehensive framework" for prohibiting "the production, distribution, and possession" of chemical weapons. *Id.* at 24; see, *e.g.*, Pet. App. 38 (Convention preamble explains that "the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons, and their destruction, represent a necessary step towards the achievement of" the objective of eliminating weapons of mass destruction). Congress could rationally have concluded that the intrastate possession, manufacture, and distribution of these weapons substantially affects interstate commerce and must be restricted to control the interstate market. *Raich*, 545 U.S. at 16-19; *id.* at 33-34, 39-41 (Scalia, J., concurring); see also Pet. App. 37 (Convention's recognition that it was regulating economic activity); 18 U.S.C. 229F(7) (statutory carve-out for trade in chemicals with legitimate uses).[6] Accordingly, petitioner's challenge to Section 229

U.N.T.S. 101; Convention on the Marking of Plastic Explosives for the Purpose of Detection, ICAO Doc. 9571, 30 I.L.M. 721 (Mar. 1, 1991).

[6] This case illustrates the link between intrastate possession and interstate commerce: petitioner ordered one of the chemicals used to commit her crime over the internet, Pet. App. 51 & n.2; C.A. App. 114-115, and she obtained the other chemical from her employer, a multinational chemical manufacturer, C.A. App. 193, after that chemical had been acquired and moved from a chemical company in another state, *id.* at 139, 204. See J.A. 13-15 (indictment).

can be rejected without exploring amicus's theories about the uniqueness of treaty-based claims.

b. Even if Section 229 were justified solely as an exercise of Congress's Necessary and Proper Clause authority to implement treaties, petitioner would have standing to raise the claim. Amicus contends (Br. 45-46) that petitioner's "claim cannot be an Article I, § 8 challenge" because *Missouri* v. *Holland*, *supra*, establishes that Congress's authority to implement treaties is not limited by its enumerated powers. Amicus's reading of *Missouri* v. *Holland* is correct, but his conclusion does not follow.

Amicus seeks to define petitioner's claim by positing one way in which it would fail on the merits. *Missouri* v. *Holland* did reject an Article I challenge to a treaty, explaining that "[i]f [a] treaty is valid there can be no dispute about the validity of the statute under Article 1, § 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. at 432; see *United States* v. *Lara*, 541 U.S. 193, 201 (2004). But petitioner does not dispute (Br. 39-40) *Holland*'s holding that Congress has broad authority to implement valid treaties; instead, she argues that *Holland* should be "reassess[ed]" and "overrul[led]." In her view, Congress cannot "use international treaties to enact criminal legislation addressing subjects that are otherwise beyond Congress's legislative powers." C.A. App. 82.

The foreclosure of petitioner's argument under current law does not preclude her from challenging that law. See, *e.g.*, *Warth*, 422 U.S. at 500 ("[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal."); see also *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990); *Camp*, 397 U.S. at 153. Nor does it transform her claim from a challenge to congressional power under Article I into a challenge—as amicus puts it (Br. 10-12)—to the "Treaty Power" itself under Article II.

Petitioner has never argued that the Chemical Weapons Convention is itself invalid under the Tenth Amendment; she has argued only that Congress does not have the authority to enact Section 229 to implement the Convention.

c. Because amicus concludes that petitioner cannot challenge Congress's Article I authority to enact Section 229, he reasons that petitioner must be raising a Tenth Amendment claim that belongs to the States. Amicus Br. 34-36, 46-47. Amicus does not define this Tenth Amendment claim, or explain why it may *only* be raised by States, or explain which States would be expected to raise it. Instead, he cites statements petitioner made in the courts below about how (in her view) Section 229 intrudes on state prerogatives. *Id.* at 34-36 & n.7. All of these statements, however, were made in support of petitioner's argument that Congress exceeded its Article I authority in enacting Section 229, and as she herself explained, her only "Tenth Amendment argument" was that "the States did not delegate to Congress the power to enact [Section 229]," an argument that is wholly "ancillary" to her enumerated-powers claim. Pet. for Reh'g En Banc 5-6; see, *e.g.*, *Comstock*, 130 S. Ct. at 1962 (Congress's Article I powers "by definition" are "not powers that the Constitution 'reserved to the States'"). Accordingly, petitioner has not raised the type of Tenth Amendment claim that belongs only to the States.

3. Because petitioner challenges Congress's authority to regulate her own conduct under Article I, the prudential limitation on third-party standing relied upon in *TVA* does not bar her claim. Petitioner's claim is the type of enumerated-powers challenge routinely raised by private litigants and considered by the courts, see U.S. Br. 30-31, not the type of state-sovereignty-based challenge that belongs only to a State or state officials, see *id.* at 43 n.17. A State would not have standing to challenge Section 229 on

petitioner's behalf, see, *e.g.*, *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923), see also U.S. Br. 27-28, and it should not be expected to do so where, as here, the prosecution does not injure the State by, for example, requiring it to "enact or enforce a federal regulatory program," *Printz*, 521 U.S. at 935.

D. Justiciability Considerations Do Not Provide A Basis For Affirming The Decision Below

1. Amicus contends (Br. 42, 48-56) that petitioner's claim presents a nonjusticiable political question because it implicates the scope of the Treaty Power. That argument was not addressed below, and the Court can resolve the standing issue presented here without resolving the distinct political question issue amicus raises. See *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) (the "standing and political question doctrines" each "pose[] a distinct and separate limitation," and the Court may address a standing objection before addressing the political question objection). That course is particularly appropriate here because, as discussed above, Section 229 can be sustained without any need to inquire into the Treaty Power. See pp. 13-17, *supra*.

2. Were the Court to consider amicus's justiciability argument, it should reject it in the present context. Amicus's justiciability argument is premised on the view that petitioner "challenges * * * the exercise of foreign relations powers by the political branches." Amicus Br. 48. But petitioner has not argued that the Convention itself is invalid; instead, her only argument is that Congress exceeded its authority in enacting Section 229. That type of claim does not require the courts to review the conduct of the political Branches in entering into or terminating treaties; it only requires courts to explore the enumerated powers of

Congress, an area with which the courts are quite familiar. Indeed, this Court adjudicated just such a claim on the merits in *Missouri* v. *Holland*. That decision, and the numerous other decisions addressing Congress's implementation of treaties[7] and Congress's Article I authority in other contexts, see U.S. Br. 29-32 (citing cases), refute amicus's contention that petitioner's particular claim raises a nonjusticiable political question.[8]

It may well be that some challenges to the treaty-making process raise political questions. But the Court need not grapple with those potentially difficult issues here, where petitioner has not challenged the validity of the Chemical Weapons Convention, but only Congress's implementation of it through Section 229.

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[7] See, *e.g.*, *United States* v. *Belfast*, 611 F.3d 783, 804-805 (11th Cir. 2010), petition for cert. pending, No. 10-8120 (filed Dec. 22, 2010); *Shi*, 525 F.3d at 720-721; *United States* v. *Ferreira*, 275 F.3d 1020, 1027 (11th Cir. 2001), cert. denied, 535 U.S. 977, 535 U.S. 1028, and 537 U.S. 926 (2002); *United States* v. *Lue*, 134 F.3d 79, 82-84 (2d Cir. 1998); *United States* v. *Rodriquez Camacho*, 468 F.2d 1220, 1222 (9th Cir. 1972), cert. denied, 410 U.S. 985 (1973).

[8] Amicus also suggests (Br. 53-56) that if petitioner's claim is nonjusticiable with respect to her, it is justiciable if advanced by a State. But the political question doctrine concerns whether courts should decide a certain question, not who should be allowed to bring a claim. See, *e.g.*, *Baker* v. *Carr*, 369 U.S. 186, 210-213 (1962).

* * * * *

For the foregoing reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

FEBRUARY 2011

REPLY BRIEF

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Supreme Court, U.S.
FILED
FEB 9 - 2011
OFFICE OF THE CLERK

No. 09-1227

In the
Supreme Court of the United States

CAROL ANNE BOND,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This is not a difficult case. Unlike a plaintiff who seeks to inject the judiciary into an abstract dispute or asks a court to adjudicate the rights of third parties, petitioner's interest is far more modest. She would be quite content to leave the federal courthouse doors shut. But having been haled into court by a federal prosecutor, petitioner merely seeks leave to argue that the statute under which she has been deprived of her liberty is beyond Congress's power to pass. Petitioner readily satisfies the ordinary three-part test for Article III standing, and no brief submitted to this Court argues otherwise.

The judgment below that petitioner lacks standing is defended only by the *amicus curiae* appointed for that purpose. And *amicus* does not defend the reasoning of the court of appeals. Indeed, the lengths to which *amicus* must go—advancing novel theories about the justiciability of treaty power issues and arguing that legislation enacted to fulfill treaty obligations is something other than Article I legislation—underscore the indefensibility of the judgment below. The nub of *amicus*'s argument appears to be that *Tennessee Electric Power Company v. Tennessee Valley Authority*, 306 U.S. 118 (1939), can be understood as a prudential standing case that prohibits individuals from raising certain Tenth Amendment claims because the individual is asserting interests that belong only to third parties (*i.e.*, the States).

This argument fails because it conflates the long discarded "legal interest" test and third party

standing doctrine. *Tennessee Electric* is not a third-party standing case. The entire opinion, including the cryptic statement about Ninth and Tenth Amendment claims, is a product of the then-governing "legal interest" test for standing. The petitioners in *Tennessee Electric* lacked standing not because they asserted the rights of third parties, but because they did not identify a legally protected interest in being free from competition by the Tennessee Valley Authority and so their injury-in-fact was dismissed as *damnum absque injuria* (damage without a legal injury). 306 U.S. at 137–38, 140. That approach to standing has long since been abandoned in favor of the modern three-part test, and *Tennessee Electric* should be dismissed as a relic of the *ancien régime*.

To be sure, the Court continues to apply prudential limitations on third-party standing. But that has nothing to do with *Tennessee Electric* or this case. Petitioner is "championing her own rights"—namely, the right not to be incarcerated for six years under a federal statute that impermissibly exceeds Congress's enumerated powers and violates the Tenth Amendment. In other words, petitioner seeks to vindicate not some abstract right belonging only to States, but her own liberty interest in being free of a federal police power decidedly not granted to Congress by our Constitution.

The efforts of *amicus* (and of the United States) to distinguish between various kinds of enumerated powers and/or Tenth Amendment claims for standing purposes is fundamentally misguided. Indeed, the inability of *amicus* and the United States to agree whether petitioner's claims qualify for

disfavored treatment does not bode well for the whole enterprise. And the nature of the claims petitioner actually has advanced underscores that the proposed dichotomization of claims is not workable.

Throughout this litigation, petitioner has argued that the statute *both* exceeds Congress's enumerated powers *and* violates bedrock federalism principles. *Amicus* seeks to avoid that conclusion by arguing that petitioner's Tenth Amendment challenge "necessarily" must be one that belongs exclusively to the States because, under *Missouri v. Holland*, 252 U.S. 416 (1920), treaty-implementing legislation is not constrained by Congress's enumerated powers. Amicus Br. 42. But that novel theory is misguided. Congressional legislation to implement a treaty remains legislation enacted pursuant to an enumerated power—namely, Article I, Section 8, Clause 18—or the constitutional problems here are even greater than petitioner feared.

The approach of *amicus* and the United States suffers from even more fundamental defects. The radical notion that private parties should be barred from invoking the Tenth Amendment's federalism protections cannot be squared with either the amendment's text or this Court's decisions. The Tenth Amendment expressly safeguards the right of "the people," a phrase this Court has emphasized confers individual rights. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 579 (2008). Moreover, the Court has recognized that the Tenth Amendment exists "for the protection of individuals" and not to "protect the sovereignty of the States for the benefit of the States." *New York v. United*

States, 505 U.S. 144, 181 (1992). As this Court's decisions confirm, standing poses no obstacle to litigation by individuals to vindicate structural constitutional provisions that ensure the diffusion of governmental power for the purpose of preserving individual liberty. *See, e.g.*, *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010).

Finally, there is no merit to *amicus*'s creative, alternative argument that a Tenth Amendment challenge to treaty-implementing legislation is inherently non-justiciable. As *amicus* acknowledges, it is well-established that a claim that a treaty-implementing statute violates individual constitutional rights is justiciable. *See* Amicus Br. 48. *Amicus*'s argument for carving out Tenth Amendment claims from that settled principle rests on the same false premise as his standing argument—namely, that the Tenth Amendment exists only for the protection of States, not individuals. Moreover, this Court's precedents establish that a federalism-based challenge to treaty-implementing governmental action is justiciable. *See Medellín v. Texas*, 552 U.S. 491 (2008). *Amicus*'s invocation of the political question doctrine underscores the problem here. Petitioner's complaint is that her prosecution has nothing to do with the foreign relations concerns that are the proper subject of federal legislation and the political question doctrine. The proper resolution of this case requires no re-conceptualization of the treaty power or the political question doctrine—just a straightforward application of the Court's modern standing doctrine.

ARGUMENT

I. Petitioner Has Standing To Challenge Her Conviction And Imprisonment.

Petitioner clearly has Article III and prudential standing to challenge the constitutionality of the statute under which her liberty is being deprived. *Amicus*'s position conflates the "legal interest" test with notions of third-party standing, misunderstands the requirements of prudential standing, and mischaracterizes the nature of petitioner's claims.

A. Petitioner Clearly Has Article III And Prudential Standing.

1. No party before this Court has defended either the government's position below or the lower court's reasoning in denying petitioner Article III standing. And no one disputes that petitioner satisfies the three-part test for constitutional standing: injury-in-fact, causation, and redressability. *See* Amicus Br. 14; U.S. Br. 21–23. As described in petitioner's opening brief, the injuries she has suffered—her criminal conviction and imprisonment in a federal penitentiary—are among the most concrete and particularized deprivations of liberty imaginable. Instead of a potential three-month sentence under state law for aggravated assault, petitioner's federal sentence is 24 times longer and accompanied by five years of supervised release, nearly $12,000 in fines and restitution, and statutory ineligibility for release pending appeal. *See* Pet. Br. 11–12. Moreover, there is no dispute that this deprivation of liberty is directly traceable to her conviction under a federal

statute that she contends exceeds Congress's lawful authority, or that a ruling in petitioner's favor would redress that injury. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

2. *Amicus* attempts to defend the judgment below and resuscitate *Tennessee Electric* by conjuring up a novel standing argument never embraced by the lower courts or argued by the government. In particular, *amicus* suggests that petitioner lacks prudential standing. According to *amicus*, petitioner's claim is a pure Tenth Amendment "commandeering-type claim" that, unlike an "enumerated powers" claim, asserts third-party rights that belong only to the States. *See* Amicus Br. 35–42. This argument has no grounding in *Tennessee Electric* and fails in any event: petitioner seeks to vindicate her own rights and satisfies any test for prudential standing.

Neither *Tennessee Electric* nor the decision below rested on principles of third-party or prudential standing. As explained in petitioner's opening brief, the entirety of *Tennessee Electric*'s standing analysis, including the confounding statement about standing to raise Ninth and Tenth Amendment claims, was a product of the long-discarded "legal interest" test. Pet. Br. 17–21. Under that test, it was not enough to suffer injury-in-fact (and show traceability and redressability); the plaintiff's injury needed to correspond to a legally protected interest, otherwise it was dismissed as *damnum absque injuria*. The Supreme Court rejected all of the plaintiffs' claims—under the Fifth, Ninth, and Tenth Amendments—as *damnum absque injuria* because plaintiffs failed to point to a legal

right to be free from competition. *Tenn. Elec.*, 306 U.S. at 137–38. The Court then addressed the Ninth and Tenth Amendment claims separately, not because it was announcing a special rule *disfavoring* Ninth and Tenth Amendment claims, but because plaintiffs had argued that they had standing to raise such claims even if they lacked standing to raise their other claims. *See Tenn. Elec.*, Reply Br. 93–94, 100.* In other words, the Court rejected plaintiffs' plea for a special rule *favoring* Ninth and Tenth Amendment claims, and did so applying the same legal interest test it applied elsewhere in its opinion and has long since discarded. Concerns about federal litigation encroaching on areas of traditional state legislative authority did not implicate the plaintiffs' legally protected interests.

Amicus's effort to salvage *Tennessee Electric* by re-conceptualizing it as a third-party prudential standing case does not work. Standing was rejected there not because plaintiffs were asserting the rights of others, but because plaintiffs could not identify a violation of a legally protected interest, and so their own injuries—not someone else's—were dismissed as *damnum absque injuria*. In this case, the lower court did not rest its decision on principles of prudential standing because it is crystal clear that the liberty interest petitioner seeks to protect is her own.

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* It is worth noting that Solicitor General Jackson made no distinct argument concerning the Ninth and Tenth Amendments but argued only that all of the plaintiffs' claims failed the legal interest test. This omission was not due to page limits, there were none and he filed a 261-page brief.

3. Prudential limits on third-party standing are designed to "assur[e] that the most effective advocate of the rights at issue is present to champion them." *Duke Power Co. v. Carolina Envt'l Study Grp., Inc.*, 438 U.S. 59, 80 (1978). In this respect, the prudential standing doctrine has a "close relationship to the policies reflected in the Article III requirement of actual or threatened injury amenable to judicial remedy." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 475 (1982). The doctrine's purpose is to prevent federal courts from deciding "abstract questions of wide public significance" when "judicial intervention may be unnecessary to protect individual rights." *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

The third-party standing doctrine is not "absolute," *Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004), and does not apply "to all cases as a matter of course." *Duke Power*, 438 U.S. at 80. This Court has thus "allowed standing to litigate the rights of third parties when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights." *Kowalski*, 543 U.S. at 129–30 (citations and quotations omitted) (emphasis added). Moreover, where, as here, a party "champions [her] own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied." *Duke Power*, 438 U.S. at 80–81; *see also Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264

(1977) (no prudential bar because "one individual plaintiff" has standing "to assert these rights as his own").

As the government concedes, petitioner readily satisfies the prerequisites for prudential standing. *See* U.S. Br. 11. This Court's third-party standing cases "are not on point" because petitioner is "asserting first-party, not third-party, legal rights." *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 290 (2008). Petitioner is not seeking to litigate someone else's due process rights, *see Tileston v. Ullman*, 318 U.S. 44, 46 (1943); she is not complaining about a zoning ordinance that might indirectly harm other town residents, *see Warth*, 422 U.S. at 514; she is not asserting the rights of other hypothetical criminal defendants, *see Kowalski*, 543 U.S. at 130–31; and she is not asserting a quasi-legislative interest in defending the constitutionality of a state statute. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 65–66 (1997). Nor is she seeking to litigate an abstract question or a generalized grievance. *See Duke Power*, 438 U.S. at 80. To the contrary, she is asserting an individualized claim that relies on her own rights—namely, the right not to be unlawfully imprisoned for violating a statute (18 U.S.C. § 229) that, at least as applied to her, exceeds Congress's enumerated powers and is inconsistent with the Tenth Amendment. Petitioner, not some state official or other third party, sits in federal prison and is the "most directly affected and thus best situated to advocate" her interest and position. Amicus Br. 19.

B. *Amicus* Mischaracterizes Petitioner's Claims And Improperly Conflates Standing With The Merits.

1. To support his novel standing theory, *amicus* not only must re-conceptualize *Tennessee Electric* as a prudential standing decision, he also must recast petitioner's claims. *Amicus* thus contends that, instead of challenging the statute under which she was convicted as in excess of Congress's enumerated powers, petitioner has limited her challenge to a Tenth Amendment claim akin to a "commandeering-type claim." *See* Amicus Br. 42. This attempt to posit a dichotomy between enumerated powers and Tenth Amendment claims and then to force petitioner's claims into the latter camp does not work. Even if there were some valid distinction between these types of claims, the record confirms that petitioner has challenged the statute as *both* exceeding Congress's enumerated powers *and* violating the federalism principles embodied in the Tenth Amendment. Because the two inquiries are "mirror images of each other," *New York*, 505 U.S. at 156, they are both properly part and parcel of petitioner's "right to be free from punishment under a statute that is invalid, either facially or as applied to her, because it exceeds Congress's legislative authority." U.S. Br. 11.

As the government recognizes, petitioner argued in the district court that "'[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution'" and that 18 U.S.C. § 229 did not satisfy this basic requirement. *Id.* at 16–17 (quoting CA3 App. 46, 52). She likewise argued before the court of appeals that "the Treaty

Power and the Necessary and Proper Clause were insufficient to confer authority" on Congress to enact section 229 "without 'another basis in the Constitution,'" and that the statute lacked a "'federal nexus.'" *Id.* at 17–18 (quoting CA3 App. 11, 19). Petitioner framed the "essential question" as whether Congress "can utilize international treaties to enact criminal legislation addressing subjects that are otherwise beyond Congress's legislative powers." Pet. C.A. Br. 17; *see also* U.S. Br. 18 (describing petitioner's petition for rehearing *en banc*). And she argued that the federal statute, and its definition of "chemical weapon," must be construed narrowly to avoid serious constitutional problems. *See* Pet. C.A. Br. 28–29, 32.

In addition, petitioner paired these allegations with the mirror-image allegations that Congress has violated basic principles of federalism. Petitioner thus asserted that section 229 "'signals an unwarranted federal intrusion into [the] state law enforcement domain.'" Amicus Br. 4 (quoting CA3 App. 42). As she explained, the government's position means it could "'enter and displace law enforcement functions traditionally reserved to the states by utilization of the Treaty Power ... the antithesis of federalism expressed in the Tenth Amendment.'" *Id.* at 36 (quoting JA 31).

2. *Amicus*'s position suffers the further defect of improperly importing the merits into the threshold standing question. Perhaps this is an inevitable byproduct of *amicus*'s attempt to preserve a role for *Tennessee Electric*, which was based on a "legal interest" test that was discarded in part because of its tendency to conflate standing and the

merits. In any event, rather than allow petitioner to be master of her claims or acknowledge that she has made both enumerated powers and Tenth Amendment claims, *amicus* argues that her challenge "*necessarily*" must be a "commandeering-type" claim because it is "*implausible* to argue that a challenge to the Treaty Power is really an Article I challenge." *Id.* at 31, 42 (emphasis added). According to *amicus*, because *Missouri v. Holland* "recognized that the Treaty Power ... permits Congress to legislate on subjects that might not otherwise be within its Article I, § 8 authority," that decision means there can be "no valid claim" that Congress has exceeded the limits of its Article I, § 8 enumerated powers. *Id.* at 12, *see also id.* at 44 ("*Holland* is key" to the "framing [of] petitioner's claim").

But petitioner's position is very much that *Holland* does *not* mean that Congress has police power as long as its legislation is arguably germane to a treaty. And if *Holland* really does stand for that remarkable proposition, there is no reason the decision is sacrosanct and should not be re-examined. As the Third Circuit recognized, there is "significant scholarly debate" over the proper interpretation of *Holland* and whether *Holland* warrants "reconsideration." Pet. App. 10 & n.4; *see also* Ctr. for Const'l Juris. Br. 10-22. Moreover, if there are two plausible constructions of the statute, only one of which depends on an extreme reading of *Holland* and engenders the grave constitutional doubts raised by that reading, the courts should be free to adopt the saving construction. In any event, as this Court has emphasized, standing is "a

threshold inquiry that in no way depends on the merits of the case." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31 (1993) (per curiam) (internal quotation marks omitted). If this case presents one of the rare circumstances where standing and the merits are inextricably intertwined, as *amicus* suggests, Amicus Br. 34, the proper course is to order supplemental briefing on the merits, not to reject standing on a novel basis that improperly injects a not-fully-briefed merits question into the fully-briefed standing question.

II. This Court Should Not Create A Special Standing Rule For Tenth Amendment Claims.

The court of appeals interpreted a single, cryptic sentence from *Tennessee Electric* to mean that private parties categorically lack standing to raise Tenth Amendment claims absent the participation of the State or state officials in the litigation. As explained in petitioner's opening brief, it is not at all clear that *Tennessee Electric* ever stood for that proposition but, in all events, the time is nigh for this Court to inter its troublesome language. *See* Pet. Br. 21–27. Moreover, the suggestion of *amicus* and the government that *Tennessee Electric* should be preserved for certain Tenth Amendment claims is contrary to precedent and unworkable as a practical matter—a point vividly illustrated by *amicus* and the government's disagreement over which Tenth Amendment claims are special enough for the special rule.

A. The Court Should Not Adopt A Bifurcated Test.

The government and *amicus* both urge the Court to adopt a new bifurcated test for Tenth Amendment standing that would distinguish between "enumerated powers" claims and other Tenth Amendment claims more akin to "commandeering-type" challenges. In particular, they would apply the ordinary prerequisites of standing to private-party claims of the first type, while retaining *Tennessee Electric*'s categorical bar on private-party standing absent State participation for claims of the second type. *See* U.S. Br. 45; Amicus Br. 30. As explained in petitioner's opening brief, these artificial distinctions are both improper and unnecessary. *See* Pet. Br. 27–29. Ordinary principles of standing are more than up to the task of filtering out abstract or generalized grievances, no matter the underlying constitutional provision.

1. *Amicus*'s and the government's arguments, to one extent or another, all depend on the view that certain federalism or Tenth Amendment claims should be treated as distinct from enumerated powers claims and subjected to a unique standing rule. *See* Amicus Br. 47; U.S. Br. 45. For example, *amicus* argues that this case differs from an enumerated powers claim because the statute petitioner challenges "is based on a non-Article I power—the Treaty Power." Amicus Br. 34. But this argument disintegrates on examination. Although the Chemical Weapons Convention was adopted pursuant to the Article II treaty power, its implementing legislation was enacted pursuant to the Necessary and Proper Clause of Article I,

Section 8, and it is that exercise of Article I authority to which petitioner objects. Petitioner is not imprisoned for violating the treaty, but for violating the federal statute. And the question is not whether the Convention itself was proper, but whether the implementing legislation exceeds Congress's enumerated powers. As the brief filed by the Center for Constitutional Jurisprudence explains, "Congress cannot 'validly' exceed its enumerated powers by the simple expedient of relying on a treaty rather than Article I." Ctr. for Const'l Juris. Br. 18; *see also id.* at 11–22. These principles apply with special force where, as here, Congress's treaty power and the limits on its enumerated powers are easily reconciled by properly interpreting the meaning of "chemical weapon" in the federal statute in a way that simultaneously discharges our treaty obligations and preserves our basic federalist structure.

2. *Amicus*'s and the federal government's suggestion that only States, not private parties, have standing to invoke the structural protections of the Tenth Amendment cannot be reconciled with the Amendment's text or with this Court's cases. The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*." U.S. Const. amend. X (emphasis added). As historians have shown, the words "to the people" were intentionally and conspicuously added to the Tenth Amendment. CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 37, 41 n.23 (Helen E. Veit, et al., eds. 1991); *see also* Akhil R. Amar, *Of Sovereignty and Federalism*, 96 Yale

L.J. 1425, 1456 (1987). Moreover, the phrase "the people," as the Court has recently emphasized, distinctly confers individual rights. *See, e.g.*, *Heller*, 554 U.S. at 579 (Second Amendment "right of the people" to keep and bear arms is an individual right); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) ("the people" is a "term of art employed in select parts of the Constitution"); *see also Parker v. District of Columbia*, 478 F.3d 370, 381–82 (D.C. Cir. 2007) (Silberman, J.). Indeed, these words may supply the answer to the question whether the Tenth Amendment is more than a mere truism: at a minimum, it provides an explicit individual right to enforce the structural guarantees implicit in enumerated and limited federal power.

This Court has thus expressly recognized that the Tenth Amendment exists "for the protection of individuals," not "for the benefit of the States or state governments as abstract political entities." *New York*, 505 U.S. at 181. This point was recently confirmed in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, where the Court relied on *New York* to reaffirm that the "separation of powers," whether horizontal or vertical, "does not depend on ... whether 'the encroached-upon branch approves the encroachment.'" 130 S. Ct. at 3155 (quoting *New York*, 505 U.S. at 182). Even as the Court acknowledged that the executive branch did not object to the alleged intrusion into its authority and, indeed, appeared in court to defend it, the Court found no obstacle to standing. *Id.* at 3151 n.2, 3155.

3. *Amicus* and the government have no meaningful response to these cases. *Amicus* asserts

that, even if federalism protects individual rights, that "does not answer the standing question" because, "in some metaphysical sense," all constitutional provisions protect individual rights. Amicus Br. 25. But that does not take into account the Tenth Amendment's text or this Court's precedents. Although it might be said that even the non-justiciable Republican Form of Government Clause protects individual rights "in some metaphysical sense," the Tenth Amendment protects individual rights far more directly, as its text and *New York* make clear.

This Court has long recognized that private individuals with concrete injuries have standing to enforce the Constitution's structural protections, with or without the support of the unit of government alleged to have suffered the unconstitutional encroachment. *See, e.g.*, *Free Enter.*, 130 S. Ct. at 3151 n.2, 3155; *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (federal employee had standing to challenge legislative intrusion "into the executive function"); *INS v. Chadha*, 462 U.S. 919, 935–36 (1983) (private party had standing to argue that legislative veto violated structural requirements of bicameralism and presentment); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (private party permitted to argue that statute removed "essential attributes of the judicial power" from Article III courts). Indeed, if anything, this Court has expressed an affirmative preference for individual litigants over institutional ones. *Compare Clinton v. New York*, 524 U.S. 417, 428–36 (1998) (private party has standing to vindicate structural requirements of bicameralism and

presentment), *with Raines v. Byrd*, 521 U.S. 811, 829–30 (1997) (denying standing to legislators objecting to the same law in their official capacities).

4. The artificial distinctions that *amicus* and the government seek to draw are unworkable. Indeed, the practical difficulties of attempting to carve out a special class of Tenth Amendment claims as exempt from ordinary standing requirements are highlighted by the different arguments made by *amicus* and the government, and their inability to agree on the nature of petitioner's claims. *Amicus* would distinguish between "true Article I, § 8 claim[s] ... that the enumerated power is not broad enough to authorize the particular statute" and "Tenth Amendment claims" encompassing challenges to Article I powers that entail non-Article I limits on federal power. Amicus Br. 30–32. In contrast, the government would distinguish between "claims that the federal government has intruded upon a specific aspect of state sovereignty" and "claims that Congress lacks the authority to legislate in a certain area." U.S. Br. 14–15.

Tellingly, *amicus* and the government do not agree about the nature of petitioner's claims. *Amicus* deems petitioner's claims analogous to "commandeering-type" claims; the government declares them more akin to "enumerated powers" claims. Those diametrically opposed conclusions only crystallize the concern that the "exact boundaries that divide 'enumerated powers' claims from 'commandeering' claims are far from self-evident or self-executing." Pet. Br. 29. Moreover, petitioner's own claims illustrate the tendency of

actual litigants to raise claims that span both categories. *See* U.S. Br. 41–42.

All of this is as novel as it is confusing. Just as few courts have addressed the government's distinction, *see* Pet. Br. 28, even fewer have discerned the source-of-power divide posited by *amicus*. Indeed, neither *amicus* nor the government can account for the "Tenth Amendment" claim brought in *Tennessee Electric*. Although plaintiffs there did not self-identify their claim as an "enumerated powers" versus "commandeering-type" challenge, it appears to have been a challenge that the federal government lacked the authority to authorize the Tennessee Valley Authority's intra-state activities. Thus, in addition to its other flaws, the attempted bifurcation of Tenth Amendment claims fails to explain even *Tennessee Electric* itself.

B. The Court Should Inter *Tennessee Electric*.

The time has come for this Court to disavow *Tennessee Electric*'s single confusing sentence. To the extent it has been interpreted as a special rule disfavoring private party standing for Tenth Amendment claims, the sentence is out of step with this Court's modern standing jurisprudence and Tenth Amendment case law. A straightforward application of traditional *stare decisis* considerations favors interring that language once and for all.

1. Neither *amicus* nor the government can dispute that *Tennessee Electric* is a product of the now-defunct "legal interest" test, or that contemporaneous decisions confirm that the Court did not intend to create a broad new constitutional

rule of standing for Tenth Amendment claims. *See, e.g.*, U.S. Br. 38 n.15. Indeed, the sentence is best read as rejecting a special rule favoring Ninth Amendment and Tenth Amendment claims. It is telling in that regard that Solicitor General Jackson never argued for a special rule disfavoring Ninth and Tenth Amendment claims. *See supra* at 7 n.*. But to the extent the sentence has been read as a rule disfavoring standing to raise Tenth Amendment claims, the rule is a relic of a discarded standing regime. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153–54 (1970).

2. Contrary to *amicus*'s suggestions, jettisoning *Tennessee Electric*'s single sentence fully comports with the "prudential and pragmatic considerations" that underlie *stare decisis*. *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992). As this Court has emphasized, *stare decisis* is not an "inexorable command" in constitutional cases, especially where (as here) there is no reliance interest that weighs in favor of preserving the relevant language, nor any "special hardship" that weighs against overruling it. *Id.* The courts of appeals that have relied on *Tennessee Electric* to bar private-party standing have almost uniformly done so grudgingly with the caveat that, under *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), only this Court has the prerogative to overrule the decision. *See* Pet. App. 15; *United States v. Hacker*, 565 F.3d 522, 526 (8th Cir. 2009); *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 236 (2d Cir. 2006); *Medeiros v. Vincent*, 431 F.3d 25, 34 (1st Cir. 2005). This case is thus a fitting example of a situation where

"principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Casey*, 505 U.S. at 855.

III. Petitioner's Tenth Amendment Claim Is Justiciable.

Amicus argues in the alternative that, even assuming petitioner has standing, this Court should decline to entertain her challenge to 18 U.S.C. § 229 because the statute's validity is a non-justiciable political question. That argument is not within the question presented and has never been advanced by the government. It is, in all events, without merit.

1. *Amicus*'s concerns with private parties challenging legislation enacted to implement treaties do not translate into a valid non-justiciability argument. At the outset, *amicus* is forced to concede that "an individual may challenge a treaty or an implementing statute on the grounds that it violates a constitutional prohibition guaranteeing individual rights." Amicus Br. 48; *see also Boos v. Barry*, 485 U.S. 312, 324 (1988); *Reid v. Covert*, 354 U.S. 1, 16-17 (1957) (plurality opinion). The only reason a Tenth Amendment claim does not come within that statement is because *amicus* does not view the Tenth Amendment as protecting individual rights. But that only underscores that his non-justiciability argument is no different from his standing argument and is equally flawed. *Amicus*'s narrow conception of the Tenth Amendment is inconsistent with both the amendment's text and this Court's precedents. *See supra* at 15–18.

Amicus also must concede, in light of *Holland*, that States may bring justiciable Tenth Amendment

claims against legislation enacted to implement a treaty. *See* Amicus Br. 53. After all, the Court rejected Missouri's challenge *on the merits*. This concession is fatal to *amicus*'s non-justiciability argument. Justiciability is about *whether* certain legal disputes are suitable for judicial resolution; it is not about *who* can sue. The latter issue is the subject of standing law. If petitioner has standing to raise, *inter alia*, a *Holland* claim—and she does, *see supra* at 5–9—there is nothing non-justiciable about the claim.

In any event, precedent establishes that courts will examine whether treaty-implementing governmental action comports with the structural requirements of federalism. In *Medellín v. Texas*, this Court held that a presidential memorandum directing state courts to implement the United States' acknowledged treaty obligations by giving effect to a decision of the International Court of Justice was not binding on the courts. *See* 552 U.S. at 523–32. The Court's holding indicates that the domestic implementation of the United States' treaty obligations by the political branches must be done in compliance with the Constitution, and that there is a role for the judiciary in ensuring that constitutional limits on treaty-implementing action are not transgressed. *See id.* at 515. If a constitutional challenge to treaty-implementing action by the Executive—the branch most responsible for day-to-day treaty compliance—was justiciable in *Medellín*, then *a fortiori* there is no reason a similar challenge to treaty-implementing action by the Legislature should be non-justiciable here.

2. *Amicus*'s reliance on political-question principles only highlights the troubling consequences that flow from petitioner's federal prosecution. The prospect that a domestic dispute arising from marital infidelities and culminating in a thumb burn could be deemed a non-justiciable controversy impacting U.S. foreign affairs and diplomatic relations suggests that something—quite possibly the federal-state balance—has gone horribly awry. If *amicus* were correct that courts may not review claims that treaty-implementing legislation exceeds Congress's power, then Congress would have an unreviewable police power on any subject arguably germane to a treaty. Given the breadth of subjects comprehended by modern treaties, the realm of unchecked Congressional power would be vast.

At most, *amicus* would concede a role for States to bring such challenges. But it is cold comfort to ask citizens—especially one facing six years in a federal penitentiary—to rely on one sovereign with a legitimate claim of police power to check another sovereign asserting nearly plenary power. Some States will guard their monopoly over plenary power more jealously than others, but unless the limits on enumerated powers exist only for the benefit of the States, there is no reason a citizen must rely on her own State to vindicate her distinct liberty interests. *Cf. Gonzales v. Raich*, 545 U.S. 1, 29 (2005) ("state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause"). Moreover, as the government points out, even a State that wishes to push back against overreaching federal criminal laws will generally not have *parens patriae* standing to challenge such laws on behalf of one citizen. U.S.

Br. 26. *Amicus*'s approach thus confirms the dangers of the over-federalization of state crimes and the importance of judicial checks on federal overreaching. As in the Commerce Clause context, *see United States v. Morrison*, 529 U.S. 598, 617–19 (2000), the judiciary has an obligation to ensure that the treaty power does not become the wellspring of a plenary federal police power.

Any legal theory that would reserve to the States alone the power to challenge federal encroachments, like this one, will virtually guarantee that important constitutional questions will go unaddressed. And impeding private parties from bringing Tenth Amendment challenges to statutes that they have been personally, directly, and tangibly injured by—whether under the rubric of justiciability or standing—would eviscerate a vital and liberty-enhancing check on federal overreaching. The road to avoiding all that is straightforward: simply apply this Court's modern, three-part standing test to allow petitioner to raise issues that are no less justiciable in the hands of a citizen than in those of a state official.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

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February 9, 2011

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
DEC 10 2010
OFFICE OF THE CLERK

No. 09-1227

In The Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE STATES OF ALABAMA, COLORADO, FLORIDA, SOUTH CAROLINA, TEXAS, AND UTAH AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, contrary to the Court's regular practice, *e.g.*, *United States v. Comstock*, 130 S. Ct. 1949 (2010), a private party lacks standing to challenge a Federal statute on the ground that it violates the Tenth Amendment by intruding on State sovereignty.

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INTEREST OF AMICI CURIAE

As sovereigns possessing powers denied to the Federal government, the Amici States have a compelling interest in maintaining their full sovereignty and plenary powers against Federal intrusions. The Framers of the Constitution intended that the powers of the Federal government be "few and defined" and that the States retain powers "numerous and indefinite." *The Federalist No. 45* (James Madison). Amici seek to enforce this constitutional order.

The Petitioner seeks to vindicate this same interest, both on her own behalf and to the benefit of the States. It is not unusual that the interests of the States and their citizens will overlap in this way. To the contrary, it was the intention and expectation of the Framers that they do so. *The Federalist No. 51* (James Madison) (In our federalist system, "a double security arises to the rights of the people.").

Respondent, however, seeks to draw a false distinction between the sovereignty interests of the States and the rights of their citizens. Accordingly, Respondent would reserve to the States a large class of legal claims relating to intrusions on State sovereignty.

Amici States disclaim that they alone possess this right. There is no meaningful distinction between enumerated powers claims and sovereignty-oriented claims. Both may serve to safeguard the powers of the States and the rights of their people. Amici States also recognize that private-party suits against the

Federal government for intrusions on State sovereignty reinforce constitutional federalism and thereby advance the States' sovereignty interests. Amici States therefore welcome any and all lawsuits properly asserting federalism-based claims.[1]

SUMMARY OF ARGUMENT

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. This text draws no distinction between the States and the people with respect to the "powers not delegated" to the Federal government. Nor does the Court's jurisprudence interpreting Article III's case-or-controversy requirement. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–62 (1992).

Neither the Constitution's text, its structure, nor its purpose brooks any exception to the general rules of standing that would deny a hearing to an injured party who otherwise falls within the limits of the courts' jurisdiction, simply because that party challenges an impermissible Federal intrusion on State sovereignty.

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[1] State Amici take no position on the underlying merits of this matter.

Respondent offers an untenable, and ultimately illusory, distinction between such "sovereignty" claims and claims challenging *ultra vires* Federal acts, which are regularly entertained by the courts. The two are equivalent, "mirror images of each other." *New York v. United States*, 505 U.S. 144, 156 (1992). To the extent that *Tennessee Electric Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118 (1939), held otherwise (and this is far from clear), it has been abrogated by subsequent cases and should be put to rest.

Finally, there are important reasons why Amici States do not claim for themselves alone the right to challenge Federal intrusions on their sovereignty. First, dual sovereignty is a bulwark against Federal overreaching and a means to enforce governmental accountability. The people are its ultimate beneficiaries. They have no less an interest in preserving State sovereignty under the Constitution than the States themselves.

Second, this interest is especially acute where State officials accept, or improperly consent, to violations of State sovereignty. Such consent does not and cannot nullify the citizens' interest or ability to vindicate their rights. *See New York*, 505 U.S. at 182.

Third, States themselves suffer when their peers submit to unlawful Federal impositions, thereby creating precedent adverse to dual sovereignty.

Fourth, States are simply unable to identify and challenge each of the countless Federal statutes,

provisions, offenses, regulations, and orders that exceed proper Federal powers. Amici, therefore, welcome the efforts of private citizens to protect the Constitution's proper balance between the national government and the States.

Amici States therefore respectfully request that the Court reverse the Third Circuit's ruling below and clarify that private parties may, to the fullest extent of the law, bring claims that vindicate State sovereignty as well as their own rights.

ARGUMENT

I. PRIVATE PARTIES HAVE STANDING TO ASSERT ANY AND ALL TENTH AMENDMENT CLAIMS

Amici agree with Petitioner and Respondent that a private party challenging a statute as beyond Congress's enumerated powers can and must satisfy the "irreducible constitutional minimum" for Article III standing. *Lujan*, 504 U.S. at 560.

There is no legal basis, however, for Respondent's proposed *sui generis* rule barring standing for other Tenth Amendment claims asserting State sovereignty raised by private parties. It is divorced from the Court's jurisprudence on standing and contrary to the Court's interpretation of the Tenth Amendment.

A. Private-Party Challenges To Intrusions On State Sovereignty Present Justiciable Cases Or Controversies

To meet Article III standing requirements, a party "'must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Satisfaction of these requirements renders a case justiciable, unless there are applicable prudential reasons for not adjudicating the case. 13 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3529 (3d ed. 1998). Because standing "is an essential and unchanging part of the case-or-controversy requirement of Article III," the Federal courts have an independent duty to ensure that standing exists in each putative "case" or "controversy." *Lujan*, 504 U.S. at 560.

While diligently exercising this duty, the Court has decided numerous cases challenging the Federal government's exercise of powers. *E.g., Printz v. United States*, 521 U.S. 898 (1997); *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Comstock*, 130 S. Ct. 1949 (2010). By deciding these cases on the merits, rather than dismissing for want of jurisdiction, the Court has strongly suggested that standing exists in each. *See Newdow v. Roberts*, 603 F.3d 1002, 1014 (D.C. Cir. 2010) (Kavanaugh, J., concurring). *Lopez v. United States*, for example, was decided on the ground that a Federal criminal offense exceeded Congress's commerce power because upholding it

would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." 514 U.S. 549, 567 (1995). None of the five opinions in the case, which included two spirited dissents, suggested that standing was in question.

Respondent draws an artificial and illusory distinction between claims that Congress exceeded its enumerated powers, as in *Lopez*, and claims that some Federal act impermissibly encroaches on powers reserved by the Constitution to the States, citing *Tennessee Electric Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118 (1939) ("TVA") as exemplifying the latter. Resp. 9. As demonstrated below, however, this distinction is untenable with respect to the substance of a Tenth Amendment claim, and it is irrelevant with respect to standing.

The Tenth Amendment claim at issue in *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999), illustrates this point. The plaintiff, Gillespie, challenged a provision of the Gun Control Act of 1968 barring him, as a person convicted of a misdemeanor domestic violence offense, from carrying a firearm. *Id.* at 697. As a result, he was terminated from his position as a law enforcement officer. *Id.* at 698. Gillespie argued, *inter alia*, that the Federal offense impermissibly intruded on the State police power by supplanting State domestic violence law and, in effect, forcing

the States to administer or enforce a Federal regulatory program. *Id.* at 699.[2]

As the Seventh Circuit concluded, the plaintiff's standing was "easy to appreciate":

> Practically speaking, the Gun Control Act as amended deprives Gillespie of the ability to carry a gun, and any constitutional defect that he can identify in the statute, including a violation of the Tenth Amendment, paves the way to relief, because it will render the firearms disability imposed upon him void.

Id. at 701.

This is a correct application of this Court's standing jurisprudence. Gillespie suffered an injury that was "concrete and particularized," as well as "actual or imminent." He was denied the right to carry a firearm and, by direct operation of that disability, lost his job. *See Parker v. District of Columbia*, 478 F.3d 370, 376–78 (D.C. Cir. 2007) (finding standing where registration of firearm was denied), *aff'd, District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). This injury was "fairly traceable to the challenged action of the defendant," *Lujan*, 504 U.S. at 560 (internal quotation marks omitted), in unlawfully enacting that provision of the Gun Control Act. *See Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59,

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[2] Gillespie separately argued that the Act exceeded the commerce power, but this claim was dismissed by the district court and was not appealed. *Gillespie*, 185 F.3d at 699.

78–81 (1978) (finding causation where plaintiffs would have "likely" suffered no injury "but for" the challenged statute, even where there was no causal "nexus" between "the injuries they claim and the constitutional rights being asserted"). Finally, Gillespie's injury would "likely" be "redressed by a favorable decision," *Lujan*, 504 U.S. at 561; the bar on firearms possession would be lifted. *See Duke*, 438 U.S. at 75 (finding a "substantial likelihood" that the relief requested, invalidation of a statutory provision, "will redress the injury claimed").[3]

The crux of Gillespie's challenge, no less than in *Lopez*, *Morrison*, and *Raich*, was that he suffered an injury because of Federal intrusion on State sovereignty, and that this injury would be relieved by cure of the constitutional defect. This is true despite his challenge being framed as an intrusion on State sovereignty, rather than a case of Congress exceeding

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[3] While causation and redressability may be contested in certain "sovereignty" claims where the private party's injury is an indirect result of Federal action, the Court has held that this circumstance alone does not bar standing. *Lujan*, 504 U.S. at 562 ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded. . . ."). *See Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181–83 (2000) (finding Article III standing for environmental group to bring citizen suit to enforce Clean Water Act).

its limited powers. It follows that his claim satisfied the Court's usual test for standing.[4]

The Court's "prudential" standing requirement that "a litigant must normally assert his own legal interests rather than those of third parties," *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (citing *Craig v. Boren*, 429 U.S. 190 (1976)), may be similarly satisfied in such cases.[5] A private party challenging a Tenth Amendment violation that caused it injury, in fact, sues to assert his own legal

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[4] This result is not altered simply because Gillespie's interests were aligned with State sovereignty interests. The doctrine of standing "requires federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction." *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (internal quotation marks and citation omitted). In the usual case, this inquiry and the three-factor test above "are flip sides of the same coin," interchangeable formulations of the same rule. *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 288 (2008). That a party to a suit and third parties may share a common interest therefore does not, in general, bar standing and is, in fact, hardly unusual. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976).

[5] In its Brief Respecting Certiorari, Respondent does not identify on what basis standing for such a claim would fail. Specifically, it does not assert that a "sovereignty" claim would be unsupported by Article III standing or which, if any, of the three prongs necessary to establish standing would be unsatisfied. Nor does it state whether standing should be denied prudentially and, if so, on what basis.

interests.[6] Accordingly, prudential standing is no bar to a Tenth Amendment challenge so long as the challenged Federal act additionally threatens to violate third-party States' sovereignty rights.[7]

There is also no inherent characteristic of "sovereignty" claims that puts them outside the "zone of interests" prudential limitation on standing.[8] In applying this doctrine, "[t]he proper inquiry is simply 'whether the interest sought to be protected by the complainant is *arguably* within the zone of interests to be protected . . . by the statute.'" *Nat'l Credit*

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[6] Even were this not the case, a party may "establish[ ] independently her claim to assert *jus tertii* standing . . . to assert those concomitant rights of third parties that would be diluted or adversely affected should her constitutional challenge fail. . . ." *Craig*, 429 U.S. at 194–95 (internal quotation marks omitted). Thus, in *Craig*, a beer vendor was able to assert the rights of males 18-20 years old to purchase beer on equal footing with females of the same age where "enforcement of the challenged [statute] . . . would result indirectly in the violation of third parties' rights." *Id.* at 195. *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 805 (1985); *Singleton v. Wulff*, 428 U.S. 106 (1976).

[7] This presupposes, of course, that the private party possesses Article III standing.

[8] This discussion assumes, *arguendo*, that the "zone of interests" limitation applies to claims raised outside of the Administrative Procedure Act, 5 U.S.C. § 551, et seq., and other administrative procedure statutes. Recent decisions suggest that it does not. *See Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) ("We have interpreted § 10(a) of the APA to impose a prudential standing requirement. . . ."); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20 (1998) (Federal Election Campaign Act).

Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 492 (1998) (quoting *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)) (emphasis in original). Rather than a statute, a private party asserting that Congress has violated the Constitution's dual sovereignty principles relies on the Tenth Amendment. The text of the amendment, as well as this Court's interpretation of it, demonstrate unambiguously that the interests of individuals complaining of Federal intrusions on State sovereignty are more than "arguably . . . to be protected" by it. *See* U.S. Const. amend. X (" . . . are reserved . . . to the people"); *New York*, 505 U.S. at 181 (structural limitations on federal power are "for the protection of individuals").

Nor is a "sovereignty" claim necessarily a "generalized grievance" subject to a prudential bar. Parties "have no standing to complain simply that their Government is violating the law," *Allen v. Wright*, 468 U.S. 737, 755 (1984), but *Gillespie* demonstrates that a private party may assert a particularized harm, above and beyond abstract unlawfulness, in a Tenth Amendment "sovereignty" claim. This injury is indistinguishable from the types of harm that support standing in other contexts. *E.g., District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). By contrast, a party merely aggrieved by an unlawful intrusion on State sovereignty, but who had not suffered any personal injury as a result, would lack standing. Far from "generalized," the injuries that result from intrusions

on State sovereignty can be quite personal, no less so than those recognized in other contexts.

Finally, a private party's Tenth Amendment claim premised on State sovereignty need not involve a political question. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). To the contrary, the Court has seen fit to adjudicate even sensitive disputes touching on the relationship of the States and the Federal government. *E.g., M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *New York*, 505 U.S. at 156; *Printz v. United States*, 521 U.S. 898 (1997). Whether a claim presents a non-justiciable political question does not turn on the identity of the party asserting it. *Cf. Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (holding, in private litigation, that recognition of foreign states is a "political question" committed to the political branches); *767 Third Ave. Assocs. v. Consulate Gen. of Socialist Federal Republic of Yugoslavia*, 218 F.3d 152, 160 (2000) (barring enforcement of lease contract on ground that apportionment of liabilities among successors to Yugoslavia presented a non-justiciable political question).

For all of these reasons, this Court and others have, for example, had no trouble finding standing where police officers, rather than a State itself, have brought Tenth Amendment "sovereignty" claims. *E.g.*, *Printz v. United States*, 521 U.S. 898 (1997) (county sheriff/coroner); *Romero v. United States*, 883 F. Supp. 1076 (W.D. La. 1994) (same). *See also Steward Machine Co. v. Davis*, 301 U.S. 548, 585–90

(1937) (considering merits of private-party challenge to Federal law allegedly "involving the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our Federal form of government"). In these cases, the injury to the plaintiff was a clear result of an unlawful imposition on the State – a "commandeering." Respondent argues, however, that it is *precisely* this type of claim that a private party lacks standing to bring. Resp. 10.

In sum, under the relevant standing doctrines, a private party that has suffered a concrete injury, attributable to a Federal intrusion on State sovereignty and redressable by a favorable judgment, has standing to assert that claim against the Federal government, or its officers and agencies. This Court has never suggested otherwise.

B. Respondent's Distinction Between *Ultra Vires* And State Sovereignty Challenges Is Untenable

Respondent cannot distinguish between claims that Congress exceeded its enumerated powers (where private litigants have standing) and claims that Congress has impermissibly invaded State sovereignty (where they allegedly do not) as "two types of Tenth Amendment claim." Resp. 16. Such claims are two sides of the same coin and indistinguishable.

As this Court explained in *New York*: "If a power is delegated to Congress in the Constitution, the

Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of State sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York*, 505 U.S. at 156. Put most succinctly, "the two inquiries are mirror images of each other." *Id.* As a matter of law and precedent, this should be the end of the inquiry.

The Tenth Amendment's history confirms this "mirror image[ ]" analysis. It was included in the Bill of Rights in reaction to Anti-federalist claims that the Constitution conferred general police powers on Congress or at least, through provisions like the Necessary and Proper Clause, "opened the door to dangerous (if erroneous) interpretations of enumerated federal authority." Kurt Lash, *The Original Meaning of an Omission*, 83 Notre Dame L. Rev. 1889, 1915 (2008) [hereinafter Lash].

Virginia Governor Edmund Randolph stated his concern that the "sweepings clause" was "ambiguous, and that ambiguity may injure the States. My fear is, that it will by gradual accessions gather to a dangerous length." *Id.* (quoting Edmund Randolph, Debate in the Virginia Convention (June 17, 1788), *in* 10 *The Documentary History of the Ratification of the Constitution* 1353 (John P. Kaminski et al. eds., 1993)). Randolph therefore proposed an amendment clarifying the limits of Federal power. *Id.* James Madison responded positively: "The observations by [Randolph], on that subject, correspond precisely with my

opinion. . . . [E]very thing not granted is reserved." *Id.* at 1919. Madison later explained, after the amendment had been drafted, that it denies to the Federal government any "source of power not within the constitution itself." James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), *in James Madison, Writings* 480, 489 (Jack N. Rakove ed., 1999).

That description applies equally regardless of whether Congress invades a State's sovereignty interests through commandeering its resources and officials, imposing coercive conditions, or by enacting laws in excess of its enumerated powers. In each case, such action violates the Tenth Amendment *because* it exceeds Congress's enumerated powers.

In this way, although the "mirror image[ ]" of the powers enumerated in Article I of the Constitution, the Tenth Amendment is not a nullity. *New York* stated and applied this proposition correctly. 505 U.S. at 155–56.

Respondent rejects *New York's* approach to the Tenth Amendment, characterizing it as a "sovereignty" case where "an enumerated power may give Congress authority over a subject, but the Tenth Amendment prohibits Congress from exercising that authority in a way that unduly intrudes on State sovereignty." Resp. 10. This, Respondent claims, stands opposed to "a separate category" of Tenth Amendment claims that concern solely whether a

statute is authorized by Congress's enumerated powers. Resp. 10.

But *New York* itself, as well as the amendment's text and history, repudiates this distinction. Respondent effectively acknowledges as much by employing the above-quoted language from *New York* to define its supposed class of "enumerated powers" claims, even while excepting *New York* from that class. Resp. 10. The two are, in fact, the same and cannot be distinguished. *New York*, 505 U.S. at 156.

Finally, Respondent's proposed classification of Tenth Amendment cases for standing purposes is to be found nowhere in the history of the amendment or this Court's jurisprudence.[9] It is incompatible with both.

C. The Government's Reading Of *TVA* Is Contrary To Court Precedent Allowing Private Parties To Challenge Federal Intrusions On States' Plenary Police Power

Because there is no difference between claims that are stated in "sovereignty" terms and those that

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[9] It is not, however, entirely novel, having made an appearance in the academic literature, as a means to accomplishing other constitutional policies. *See* Nelson Lund, *Fig Leaf Federalism and Tenth Amendment Exceptionalism*, 22 Const. Commentary 11, 20-23 (surveying case law and proposing a distinction between states and private parties with respect to commerce power claims).

are stated in terms of "enumerated powers," Respondent's reading of *TVA* is also incompatible with this Court's standing jurisprudence.

The Court regularly exercises its jurisdiction to adjudicate Tenth Amendment claims raised by private parties asserting that Federal laws, facially or in their application, exceeded Congress's enumerated powers or, put conversely, invaded States' sovereign interests. In *Lopez*, for example, the basis of the respondent's claim for invalidating the Gun Free School Zones Act was that "the Constitution did not vest in Congress a general police power." Brief of Respondent, *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260), 1994 WL 396915. Similarly, in *Morrison*, the respondent challenged the government's invocation of its commerce power to support the constitutionality of a Federal criminal offense on the ground that (put most directly in a heading) "Petitioners' Rationale Would Lead To A General Police Power For Congress Inconsistent With The Doctrine Of Enumerated Powers." Brief for Respondent, *United States v. Morrison*, 529 U.S. 598 (2000), 1999 WL 1146894.

The respondent in *Raich* stated a "sovereignty" claim even more directly: "In this case, the issue is whether the Federal Government may criminalize wholly intrastate, noncommercial conduct that is *expressly authorized and supervised by a State exercising its core police powers* to preserve the lives of its citizens and reduce their pain and suffering." Brief for Respondents, *Gonzales v. Raich*, 545 U.S. 1 (2005),

2004 WL 2308766 (emphasis added).[10] And, most recently, the Court considered a private litigant's claim that a Federal civil commitment statute "violates the Tenth Amendment because it invades the province of state sovereignty in an area typically left to state control." *United States v. Comstock*, 130 S. Ct. 1949, 1962 (2010) (internal quotation marks omitted)).

That the Court asserted jurisdiction in, and decided, so many cases over a period of decades strongly suggests it found standing for the parties' Tenth Amendment claims.[11]

Despite the authority of these cases, Respondent argues that *TVA* bars Tenth Amendment claims stated in terms of "state sovereignty" rather than "enumerated powers," Resp. 9–10, a reading of the case endorsed by no court. This assertion is plainly

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[10] The same is true of *Printz*, which was not brought by a State, though asserting State interests. Brief of Petitioners, *Printz v. United States*, 521 U.S. 898 (1997), 1996 WL 464182 (petitioner "sought a declaratory judgment that [the challenged provision] is inconsistent with Art. I, § 8 and the Tenth Amendment to the United States Constitution").

[11] *See Newdow*, 603 F.3d at 1014 (Kavanaugh, J., concurring) ("[T]the Supreme Court's consistent adjudication of religious display and speech cases over a span of decades suggests that the Court has thought it obvious that the plaintiffs in those matters had standing. . . . To ignore the import of those cases for the standing analysis, one would have to believe the Supreme Court repeatedly overlooked a major standing problem and decided a plethora of highly controversial and divisive Establishment Clause cases unnecessarily and inappropriately.")

contrary to the Court's exercise of jurisdiction over expressly stated "sovereignty" claims. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997); *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Comstock*, 130 S. Ct. 1949 (2010). Even were these cases otherwise classified, or distinguished on some other basis, Respondent's assertion still runs afoul of the Court's exercise of jurisdiction over any and all Tenth Amendment claims; all are "sovereignty" claims as much as "enumerated powers" claims.

Rather than stating an absolute bar on certain Tenth Amendment claims as Respondent suggests, *TVA* more easily bears a narrow reading that is consistent with the Court's contemporaneous and subsequent case law. The *TVA* plaintiffs, private electricity producers, challenged the operations of the Federal Tennessee Valley Authority on various constitutional grounds claiming, among other things, that TVA's wholesale electricity supply contracts (which stipulated the rates at which local utilities could *resell* electricity), amounted to actual rate regulation. 306 U.S. at 143. This, they argued, "cannot be upheld without permitting federal regulation of purely local matters reserved to the states or the people by the Tenth Amendment." *Id.*

The Court rejected this contention on the ground that a price maintenance contract, rather than a regulation, "is nothing more than an incident of competition." *Id.* at 144. It then noted, with respect to plaintiffs' standing to bring this particular claim:

> As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing in this suit to raise any question under the amendment.

Id.

Read in context, this text simply reaffirms the ordinary rule that private litigants cannot challenge Federal actions in gross, as simply being unlawful, without also showing some particularized injury, and confirms that this ordinary rule applies equally in challenges to invasion of States' sovereign interests. The sole injury petitioners asserted in *TVA* was to their bottom line – that is, TVA's tactics had forced them to lower their own rates and, accordingly, suffer a diminution in profits. *Id.* at 137–38. Mere competitive injury is not a legally protected interest,[12] and this was well established at the time. *See Louisiana v. McAdoo*, 234 U.S. 627, 631–32 (1914) (dismissing a claim by Louisiana challenging a tariff rate reduction on Cuban sugar, which competed with that sold by the State).[13] *TVA's* discussion of legally cognizable

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[12] Petitioners did not allege, for example, that TVA had engaged in unfair competition or monopoly behavior. *See TVA*, 306 U.S. at 139.

[13] Indeed, *TVA* discusses this point in some detail, 306 U.S. at 139, and within months after it issued, and for years following, was widely cited in support of it. *See, e.g., Porto Rico Ry., Light & Power Co. v. Colom*, 106 F.2d 345 (1st Cir. 1939); *Sw. Gas & Elec. Co. v. City of Texarkana*, 104 F.2d 847 (5th Cir.

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injury illuminates its otherwise cryptic passage on standing,[14] transforming a stray remark with severe consequences into a sensible holding. Where this holding has been taken out of context and misapplied, the lower courts (like Respondents) have done so in plain conflict with this Court's consistent and more recent precedent.

1939); *Lukens Steel Co. v. Perkins*, 70 App. D.C. 354, 107 F.2d 627 (D.C. Cir. 1939) ("one cannot complain of or prevent damage by lawful competition, even though the competition or its damaging character may be due to the action by officers of the United States which is attacked as lawless"), *rev'd, Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); *Arkansas-Missouri Power Corp. v. City of Kennett*, 113 F.2d 595 (8th Cir. 1940); *Associated Indus. of N.Y. State v. Ickes*, 134 F.2d 694, 701 (2d Cir. 1943) ("[F]inancial loss resulting from increased lawful competition with a plaintiff, made possible solely by the defendant official's unlawful action, is insufficient to create a justiciable controversy.").

[14] As the passage additionally explains, the States are unaffected by the electric producers' failure of standing, remaining able to assert an injury to their sovereign rights. It is, as a whole, an unexceptional application of the Article III bar on predicating standing wholly on the rights of third parties. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) (A party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.").

II. PRIVATE PARTY STANDING TO ASSERT STATE SOVEREIGNTY IS NECESSARY TO PRESERVE DUAL SOVEREIGNTY AND PROTECT PRIVATE PARTIES AGAINST FEDERAL OVERREACHING

"In the tension between federal and state power lies the promise of liberty." *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991).

Our system of dual sovereignty exists for the ultimate benefit of the people as citizens of the States, not for the States *qua* States. For that reason in particular, private parties should not be denied the opportunity to vindicate their rights and interests when these are infringed by federal usurpation of powers reserved to the States and the people.

A. Our System Of Dual Sovereignty Exists To Safeguard The Rights Of The People

For the Constitution's Framers, federalism as a means to "preserving the individual sovereignty of the 'peoples' of the several states." Lash, at 1925. They intended, and the careful enumeration of Federal powers reflects, that the States and the Federal government would each check the other's abuses. This would work in conjunction with the division of Federal powers between the branches of government to "secure" the people's rights:

> In the compound republic of America, the power *surrendered* by the people is first

> divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

The Federalist No. 51 (James Madison) (emphasis added). *See also The Federalist No. 28* (Alexander Hamilton) ("Power being almost always the rival of power . . . .")

The use of the word "surrendered" was not incidental. The Framers' Constitution embodies the principle of popular sovereignty – that all power derives from the people. Lash, *supra*, at 1922–24. This was a direct repudiation of contemporary political systems in which sovereignty inured only in the state (or prince). As the Court has explained, this fundamental principle underlies the very structure of the Constitution and the rights that it reserves. *See e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 274–75 (1964) ("[Madison's] premise was that the Constitution created a form of government under which 'The people, not the government, possess the absolute sovereignty' . . . This form of government was 'altogether different' from the British form, under which the Crown was sovereign and the people were subjects.") (internal citations omitted).

It would be incongruous if the States alone could challenge Federal actions upsetting this critical

balance, because its purpose was and is to guard and vindicate the rights of individual citizens.

B. A State's Consent Or Acquiescence To Unconstitutional Intrusions On Its Sovereignty Does Not Nullify Its Citizens' Rights As Against The Federal Government

Moreover, the States may not waive their rights, or those of their citizens, by consent or acquiescence in unconstitutional Federal intrusions on their legitimate authority. Because the Federal government is one of limited powers, its *ultra vires* acts, even if ratified by a State, remain *ultra vires* and unlawful. "The constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States." *New York*, 505 U.S. at 182.

Indeed, as the Court explained in addressing the similar inability of the Federal government's three branches to cede their constitutional prerogatives, such actions vitiate the accountability of government to the people. When separated powers are muddled, "the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010) (rejecting that presidential

acquiescence might immunize from challenge otherwise impermissible intrusions on executive power).

Indeed, as the Court observed in *New York*, public officials may, to avoid such blame, favor this state of affairs. That case concerned a provision that required States to either enact legislation providing for the disposal of nuclear waste or to take title to and possession of the waste and become liable for any damages resulting from the failure to provide for disposal of the waste. 505 U.S. at 152–54. Though accountability would have been clear had the Federal government acted on the waste itself, or had a State accepted a Federal grant to do so, "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the Federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* at 169.[15]

The ability of private litigants to raise State sovereignty claims in Tenth Amendment challenges is a necessary and effective check on such tendencies on both the Federal and State levels.

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[15] This is a real and practical concern. In *Gillespie*, for example, the State government could maintain that it neither deprived the plaintiff of his right to possess a firearm nor was responsible for his dismissal from the police force. *See* 185 F.3d at 698–99. The Federal government could, in turn, maintain that the State had defined its own domestic violence law and that it exercised no control over the State's personnel decisions. In this way, authority, and thereby accountability, were diffused.

C. "Consensual Commandeering" Injures States That Resist Intrusions On Their Sovereignty And Those States' Citizens

In addition, of course, States also are harmed by the unchallenged acquiescence of their sister States in unlawful Federal encroachments. Such consent or acquiescence creates precedent against the proper assertion of State sovereignty and increases political incentives for further unconstitutional intrusions. Thus, for example, the Federal government has relied on the acquiescence of some States to justify the commandeering of State instrumentalities generally under the Clean Air Act. *See, e.g., District of Columbia v. Train*, 521 F.2d 971, 994 (D.C. Cir. 1975) (holding that, while Federal government could regulate directly, it may not "compel[ ] the states to enforce federal regulatory programs"), *vacated and remanded for consideration of mootness sub nom, EPA v. Brown*, 431 U.S. 99 (1977) (per curiam).

In other instances, States that have consented to the commandeering of their officials and instrumentalities have cited that experience in support of arguments for upholding challenged Federal statutes. *See, e.g.,* Brief of The States Of Maryland, Connecticut, Florida, Hawaii, Iowa, Michigan, Minnesota, Mississippi, Nevada, North Carolina, Oregon, Rhode Island, And Wisconsin Amici Curiae In Support Of Respondent, *Printz v. United States*, 521 U.S. 898 (1997), 1996 WL 590921 (arguing, *inter alia*, that the Brady Act's imposition on law enforcement officers is minimal).

State Amici face a similar detriment when challenging Federal programs that rely on the spending power to "coerce" State action. Coercion can be a highly fact-specific test, requiring a party challenging a Federal program to demonstrate that "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

States that consent to unlawfully compulsive Federal programs – for example, those that may be popular within the State – create precedent in favor of those programs' constitutionality that can then be employed against legitimate challenges to those programs by States that resist intrusions on their sovereignty or where the program is unpopular. This same kind of "consensual commandeering" can also skew political incentives at the Federal level.

The willingness of private litigants in such States to raise these issues under the Tenth Amendment serves as a critical check on State officials who would surrender their States' long-term interests in the cause of short-term political goals.

D. States Lack The Resources To Challenge Every Intrusion On Their Sovereign Rights

Finally, no State has the resources or ability to challenge every act of the Federal government that

intrudes on its sovereignty and injures its citizens. Indeed, the set of Federal acts that potentially run afoul of State sovereignty is so large as to resist enumeration. In 2009, for example, Congress passed, and the President signed, 125 bills; Federal regulatory agencies issued 3,503 final rules, for a total of nearly 60,000 final rules since 1995; and 68,598 pages of regulatory materials were published in the Federal Register. Clyde Wayne Crews, Jr., *Ten Thousand Commandments* 2010 2, 27 (2010) (citing agency self-reports). Of the 3,503 final rules, 514 affected the operation of State governments, and 328 affected local governments. *Id.* at 27.

No State has the capability to follow all of this lawmaking activity, much less at the level of detail that would be required to identify every encroachment on State interests. This is particularly so in the current economic environment, when States face unprecedented strains on their budgets and strong pressure to reduce expenditures.[16]

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[16] The economic slowdown of recent years "has caused the steepest decline in state tax receipts on record," with overall State revenues declining 8.4 percent in the 2009 fiscal year. Elizabeth McNichol, Phil Oliff, and Nicholas Johnson, *States Continue To Feel Recession's Impact*, Center for Budget and Policy Priorities, Oct. 7, 2010, p. 1. In 2009, 46 of the 50 States had to close significant budget gaps, on average amounting to 19 percent of their budgets. *Id.* Given the slow rate of economic recovery, and future strains on State budgets due to the recent enactment of the Patient Protection and Affordable Care Act,

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Nor do States have the capability to identify every lawsuit that implicates State interests. In the period from October 2008 through September 2009, nearly 190,000 civil cases were filed in the U.S. district courts, and nearly 12,000 in the Federal courts of appeal. Federal Judicial Center, Judicial Business of the United States Courts 8, 11 (2009) (excluding prosecutions and prisoner petitions). Tens of thousands of these cases potentially affect State governments or touch on areas of power traditionally left to the States. *See id.* at 86–90 (case statistics by subject matter).

And even if a State were able to identify each litigation potentially touching on State interests, it may lack the resources to intervene in each case. In all, the States are simply incapable of policing every act of the Federal government that exceeds its limited, enumerated powers.

For that reason and the others identified above, State Amici welcome private-party challenges under the Tenth Amendment, whether classified as resting on "enumerated powers" or "state sovereignty."

CONCLUSION

The judgment of the Third Circuit denying a private party standing to challenge a Federal statute

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Pub. L. No. 111-48, 124 Stat. 119 (2010), State budgets will continue to be tight for the foreseeable future.

on grounds that it is inconsistent with the Tenth Amendment should be reversed.

Respectfully submitted,

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DECEMBER 10, 2010

AMICUS CURIAE BRIEF

SUPREME COURT, U.S.
FILED
DEC 10 2010
OFFICE OF THE CLERK

No. 09-1227

In the

Supreme Court of the United States

CAROL ANNE BOND, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

Whether Congress can use the treaty power to circumvent the constitutional enumeration of powers that is the basis for its authority and, if it does so, whether no directly harmed individual can challenge such abuse of power.

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INTEREST OF AMICI CURIAE[1]

Amicus the Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to uphold and restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the foundational proposition that the powers of the national government are few and defined, with the residuary of sovereign authority reserved to the states or to the people. In addition to providing counsel for parties at all levels of state and federal courts, the Center and its affiliated attorneys have participated as amicus curiae or on behalf of parties before this Court in several cases addressing the constitutional limits on federal power, including *American Electric Power Co. v. Connecticut*, No. 10-174 (*cert. granted*, Dec. 6, 2010); *Reisch v. Sisney*, No. 09-953, *cert. denied*, 130 S. Ct. 3323 (2010); *Medellin v. Texas*, 552 U.S. 491 (2008); *Rapanos v. United States*, 547 U.S. 715 (2006); *GDF Realty Investments, Ltd. v. Norton*, No. 03-1619, *cert. denied*, 545 U.S. 1114 (2005); *Rancho Viejo, LLC v. Norton*, No. 03-761, *cert. denied*, 540 U.S. 1218, *reh'g denied*, 541 U.S. 1006 (2004); *Solid*

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. A letter of consent from attorneys for Respondent is being filed simultaneously with the Clerk of the Court and attorneys for Respondents and Court-appointed amicus curiae have filed blanket consents.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in any manner, and no counsel or party made a monetary contribution in order to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001); *Schaffer v. O'Neill*, No. 01-94, *cert. denied*, 534 U.S. 992 (2001); and *United States v. Morrison*, 529 U.S. 598 (2000).

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. The present case centrally concerns Cato because it represents an opportunity to clarify the limits that the Constitution places on federal power.

SUMMARY OF ARGUMENT

A criminal defendant clearly has standing to challenge the constitutionality of the federal statute under which she was convicted. The government's confession of error demonstrates just how manifestly erroneous the lower court's decision to the contrary was. But a bald remand, without some direction on the merits, will likely lead to a repetition of the substantive error that lead the lower court to its mistaken conclusion. The lower court assumed that both the power to make treaties and Congress's power to make laws that are necessary and proper to give effect to the treaty power are unconstrained by the Constitution's "enumerated powers" limits on federal power. This assumption is premised on a perfuncto-

ry acceptance of an overly broad interpretation of *Missouri v. Holland*, 252 U.S. 416 (1920). That reading of *Missouri v. Holland*, however, is contrary to prior precedent, has been undermined by subsequent decisions of this Court, and if allowed to stand, will seriously undermine the notion that the national government is one of only limited, enumerated powers. Recognition by this Court that the constitutional questions presented by Mrs. Bond warrant the full consideration by the lower courts will begin the process of serious consideration that was lacking in *Missouri v. Holland* and its progeny.

ARGUMENT

I. It Is Axiomatic that a Criminal Defendant Has Standing to Challenge the Constitutionality of the Federal Statute Under Which She Was Convicted.

Of course a criminal defendant has standing to challenge the constitutionality of a statute under which she has been convicted, as the government now wisely concedes. While the government's confession of error does not bind this Court on jurisdictional questions such as this, the argument by Petitioner that led to the government's confession of error is persuasive. This Court should accept the government's position that Petitioner had standing, not because the government confessed it, but because it is correct. The erroneous interpretation of *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118 (1939), which led the court below astray, should be expressly repudiated.

A. The Tenth Amendment Argument is Simply the Flip Side of the Enumerated Powers Coin.

This Court has repeatedly recognized that the national government is one of limited, enumerated powers, not one of unlimited authority. *E.g., Wyeth v. Levine*, 129 S. Ct. 1187, 1206 (2009); *United States v. Morrison*, 529 U.S. 598, 618 and n.8 (2000); *United States v. Lopez*, 514 U.S. 549, 552 (1995); *New York v. United States*, 505 U.S. 144, 156-57 (1992); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528-29 (1935); *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426, 428 (1821); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers"); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written"); *see also* Federalist No. 45, pp. 292-93 (Madison) (Rossiter ed. 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite").

Carol Anne Bond's contention below was that the federal statute under which she was convicted was *ultra vires*, and therefore unconstitutional. *See, e.g.*, Bond CA3 Brief at 18 (contending that Congress cannot use the treaty power to criminalize conduct not within the federal government's jurisdictional reach). Whether couched as a claim that the statute

exceeds enumerated powers or violates the Tenth Amendment's proscription that the powers not delegated to the federal government are reserved to the states or to the people, the issue whether Mrs. Bond has standing to challenge the constitutionality of the statute is the same. The Tenth Amendment is merely the "mirror image" of the enumerated powers structure of the Constitution. *New York*, 505 U.S., at 156 (1991) ("the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress").

B. Even If the Tenth Amendment Recognizes a State Sovereignty Carve-out From Otherwise Valid Exercises of Federal Power, a Criminal Defendant Has Standing to Challenge the Constitutionality of Her Conviction On Those Grounds As Well.

The Third Circuit's decision below is based on a view that the Tenth Amendment also protects state sovereign interests even in the face of otherwise valid exercises of congressional power, and that only the states have standing to defend those interests. The Third Circuit's position is wrong, both in its premise and in the conclusion it draws from that premise.

To be sure, this Court has previously suggested that the Tenth Amendment creates a carve-out of state sovereign powers that cannot be infringed by

Congress even when Congress is acting pursuant to an enumerated power. *National League of Cities v. Usury*, 426 U.S. 833, 842-43 (1976); *Fry v. United States*, 421 U.S. 542, 547 (1975). The tension created by that extra-textual reading of the Tenth Amendment was subsequently cured, however, when this Court recognized that the same idea is more properly grounded in the "proper" element of the Necessary and Proper Clause than in a penumbra of the Tenth Amendment. *Printz v. United States*, 521 U.S. 898, 923-24 (1997); *see also Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring in the judgment) ("cases such as [*Printz*] affirm that a law is not *proper* for carrying into Execution the Commerce Clause when it violates a constitutional principle of state sovereignty" (emphasis in original, internal quotation marks and brackets omitted)).

Printz thus recognizes that even the "state sovereignty" concern flows from the enumerated powers doctrine, not from a separate preserve of state powers that only the states have standing to protect. Mrs. Bond therefore has as much standing to challenge the constitutionality of the statute under which she was convicted as Mr. Lopez had to challenge his conviction in *United States* v. *Lopez*. That Congress sought to criminalize conduct in excess of its authority under the Commerce Clause in *Lopez* and in excess of its authority under the Necessary and Proper Clause in the case *sub judice* is of no moment on the jurisdictional issue. Both criminal defendants had the "concrete and particularized" "injury in fact" that this Court has deemed necessary for Article III standing, and a finding of unconstitutionality would afford as much redress to Mrs. Bond as it did to Mr. Lopez. *See Lujan v. Defenders of Wildlife*, 504 U.S.

555, 560-61 (1992). Indeed, because Mrs. Bond is the "object of the action" by the government, there should be "little question" that the government's action—its criminal prosecution—"caused [her] injury, and that a judgment preventing . . . the action will redress it." *Id.*, at 561-62.

Moreover, even if the Third Circuit's reasoning were simply shifted to an inquiry into whether the congressional intrusion into a matter of core state concern was "proper" under the Necessary and Proper Clause, Mrs. Bond would still have standing to press her challenge to the constitutionality of the statute under which she was convicted. One of the principal purposes of federalism is to protect individuals against an overreaching federal government, by subdividing sovereign authority between the federal and state governments, each capable of checking the other. *See, e.g., Gregory*, 501 U.S., at 458 ("The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties'" (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985))). It would be anomalous to hold that an individual beneficiary of this system of checks and balances could not defend her own particularized interests, when the state fails to do so. The States simply cannot sublet to the federal government powers that "We the People" assigned to the States or reserved to ourselves, and individuals who are particularly harmed by the attempted reallocation of power are not without recourse to the courts to challenge it.

C. Denying Standing to Federally Charged Criminal Defendants Eliminates an Important Avenue of Redress to the Increasing Over-Federalization of Criminal Law.

There is an emerging national consensus that the criminal law is becoming over-federalized and, as a consequence, less tethered to its core principles and aims. In May 2010, the Heritage Foundation and the National Association of Criminal Defense Lawyers—organizations often diametrically opposed to each other—co-published a study on the proliferation of the federal criminal code and the disturbing way in which such laws are often passed without a *mens rea* requirement. Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Intent Requirement in Federal Law* (2010).

The sheer number of new federal crimes boggles the mind. To wit, the federal criminal code now includes at least 4,450 crimes. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Legal Memorandum No. 26, Heritage Found. (June 16, 2008). Congress added an average of 56.5 crimes per year to the federal code between 2000 and 2007, *id.*, and has raised the total number of federal crimes by 40% since 1970. James Strazella et al., Task Force on the Federalization of Criminal Law, Am. Bar Ass'n Criminal Justice Section, *The Federalization of Criminal Law* 7 (1998). Moreover, the federal criminal code has grown not just in size but in complexity, making it difficult to both (1) determine what statutes constitute crimes, and (2) "differentiat[e] whether a single statute with different acts listed within a section or subsection includes more than a single crime and, if so, how many." John S. Baker,

Jr., *Jurisdictional and Separation of Powers Strategies To Limit the Expansion of Federal Crimes*, 54 Am. U. L. Rev. 545, 549 (2005).

Nevertheless, Congress keeps piling on. During the 109th Congress (2005-06), 446 new criminal offenses were proposed, less than half of which were sent for expert review at either the House or Senate Judiciary Committee. As a result, as this Court recently recognized in *Skilling v. United States*, 130 S. Ct. 2896 (2010), federal prosecutors are often left with enormously vague statutes that implicate core constitutional and due process concerns.

This complexity of the criminal law, as well as the sheer number of statutes on the books, makes the systemic cleansing of the federal criminal code a difficult task. It is thus crucial that criminal defendants have standing to challenge the laws under which they are charged as *ultra vires* congressional actions violating either Article I or the Tenth Amendment. As we have explained above, identical concerns underlie both constitutional provisions.

In *Lopez* and *Morrison*, this Court restored an important weapon in the arsenal of the lone criminal defendant fighting against the arrayed forces of the most powerful government the world has ever known: the idea that this government must still operate within a system of enumerated powers. One of the hallmarks of our constitutional system is that it is within the power of that lone defendant to challenge the federal government by asking the courts to review and check the actions of the coordinate branches.

Indeed, this Court has recognized that a government of enumerated powers was created for the benefit of those living under the duly constituted government, that the "first principles" of the Constitution "serve to prevent the accumulation of excessive power in any one branch," and that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 514 U.S., at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (internal quotation marks omitted)). The same "first principles" hold true for any defendant charged with a federal crime that arguably goes beyond the enumerated powers of Congress, whether they bring a claim under Article I or the Tenth Amendment.

II. The Lower Court's Lack-of-Standing Determination Erroneously Assumed that the Underlying Exercise of Federal Power Was Valid; This Court Should Therefore Address The Merits or at Least Note that Mrs. Bond's Constitutional Challenge is Unresolved.

The perfunctory but erroneous reliance on *TVA* by the Court of Appeals on the standing question is paralleled by the equally perfunctory and erroneous treatment of the merits by the district court. The district court simply noted in conclusory fashion that because Section 229 "was enacted by Congress and signed by the President under the necessary and proper clause of the Constitution ... [t]o comply with the provisions of a treaty," it was constitutionally valid and, apparently, did not contravene federalism principles, as Mrs. Bond had claimed. Pet. App. 28. Mrs. Bond's constitutional challenge cannot be dispensed with so easily.

A. The Treaty Power is Limited by the Constitution.

The root of the district court's error is the broad interpretation that has been given to this Court's century-old decision in *Missouri* v. *Holland*, 252 U.S. 416 (1920), which in the lower courts has come to stand for two related and constitutionally dubious propositions: 1) that the treaty power is not limited to the enumerated powers otherwise delegated to the national government; and 2) that the Necessary and Proper Clause is likewise not limited when utilized in support of the treaty power. *See, e.g., United States v. Lue*, 134 F.3d 79, 83 (2nd Cir. 1998) ("the United States may make an agreement on any subject suggested by its national interests in relation with other nations"); *id.*, at 84 ("If the Hostage Taking Convention is a valid exercise of the Executive's treaty power, there is little room to dispute that the legislation passed to effectuate the treaty is valid under the Necessary and Proper Clause"); *id.*, at 85 ("the treaty power is not subject to meaningful limitation under the terms of the Tenth Amendment"); *United States v. Ferreira*, 275 F.3d 1020, 1027-28 (11th Cir. 2001) (agreeing with *Lue*); *see also* Nicholas Quinn Rosenkranz, "Executing the Treaty Power," 118 Harv. L. Rev. 1867, 1871 n.11 (2005), and cases cited therein.

The broad interpretation of *Missouri* v. *Holland* results in a *sub silentio* overruling of prior precedent. In *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836), this Court held that because the "government of the United States ... is one of limited powers" and "can exercise authority over no subjects, except those which have been delegated

to it," the congressional police power authority over federal territories could not "be enlarged under the treaty-making power." *Missouri v. Holland* does not mention that precedent, much less hold that it was being overruled.

Moreover, the broad interpretation of *Missouri v. Holland* has been severely undermined by two subsequent decisions of this Court: *Reid* v. *Covert*, 354 U.S. 1 (1957), and *United States* v. *Lopez*, 514 U.S. 549 (1995).

Reid addressed whether, by adopting a statute designed to give effect to a treaty, the federal government could avoid the requirements in Article III, Section 2 of the Constitution and in the Fifth and Sixth Amendments that civilians are entitled to indictment by grand jury and trial by jury. In a rare reversal of course after a petition for rehearing allowed the Court additional time to consider just how significant a matter of basic constitutional law was at stake, the Court held that the Constitution imposed limits even on the treaty power. "The United States is entirely a creature of the Constitution," noted Justice Black, writing for the plurality and announcing the judgment of the Court. *Reid*, 354 U.S., at 5-6 (citing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 119, 136-37 (1866); *Graves v. People of State of New York ex rel. O'Keefe*, 306 U.S. 466, 477 (1939); and *Ex parte Quirin*, 317 U.S. 1, 25 (1942)). "Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." *Id.*, at 6 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80 (1803); *Territory of Hawaii v. Mankichi*, 190 U.S.

197, 236-39 (1903) (Harlan, J., dissenting)). "[T]he United States Government ... has no power except that granted by the Constitution." *Id.* at 12.

Although Justice Black was writing for a four-Justice plurality, Justice Harlan agreed with the essential point in his separate opinion concurring in the judgment: "Under the Constitution Congress has only such powers as are expressly granted or those that are implied as necessary and proper to carry out the granted powers." *Reid*, 354 U.S., at 66 (Harlan, J., concurring in judgment).[2]

The Court plurality flatly rejected the contention that the legislation depriving Mrs. Reid of her constitutional right to a civilian jury trial could "be sustained as legislation which is necessary and proper to carry out the United States' obligations under the international agreements made with [Great Britain and Japan]." According to the plurality:

> The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.

Id., at 16. And Justice Harlan specifically disclaimed reliance on an unlimited treaty power in his separate opinion concurring in the judgment:

> To say that the validity of the statute may be rested upon the inherent 'sovereign powers' of

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[2] Similarly, Justice Frankfurter, who also filed a separate opinion concurring in the judgment, recognized that a "particular provision" of the Constitution "cannot be dissevered from the rest of the Constitution." *Reid*, 354 U.S., at 44 (Frankfurter, J., concurring in judgment).

> this country in its dealings with foreign nations seems to me to be no more than begging the question. As I now see it, the validity of this court-martial jurisdiction must depend upon whether the statute, as applied to these women, can be justified as an exercise of the power, granted to Congress by Art. I, s 8, cl. 14 of the Constitution, 'To make Rules for the Government and Regulation of the land and naval Forces.' I can find no other constitutional power to which this statute can properly be related.

Id., at 66. Hence, neither the treaty power nor the Necessary and Proper Clause may be used to expand Congress' lawmaking authority beyond the powers enumerated in the Constitution.

Which brings us to *United States* v. *Lopez*, the second major decision of this Court that has undermined the overly broad interpretation that has been given to the *Missouri* v. *Holland* holding. In *Lopez*, this Court made clear that the doctrine of enumerated powers also serves as a significant restraint on the powers of the national government: "Congress' authority is limited to those powers enumerated in the Constitution, and ... those enumerated powers are interpreted as having judicially enforceable outer limits[.]" *Lopez*, 514 U.S., at 566.

Lopez's holding complements quite nicely the reasoning of *Reid*, and the two cases together cast serious doubt on the continuing vitality of the broad reading that has been given to *Missouri* v. *Holland*. The *Reid* plurality noted, for example, that "the shield which the Bill of Rights *and other parts of the Constitution* provide to protect his life and liberty

should not be stripped away just because it happens to be in another land." *Reid*, 354 U.S., at 6 (emphasis added). Further, when repudiating the holding of *In re Ross*, 140 U.S. 453 (1891), that the Constitution did not apply abroad, the *Reid* plurality specifically noted that the problem with the statutory scheme upheld in *Ross* was the "blending of executive, legislative, and judicial powers in one person or even in one branch of the Government," which it described "as the very acme of absolutism." *Reid*, 354 U.S., at 11. While individual provisions of the Bill of Rights were undoubtedly implicated as well, the *Reid* plurality did not discuss them, focusing instead on the protection of liberty provided by the core separation of powers structure found in the main body of the Constitution itself. *Id.*, at 10-12.

Similarly, the *Reid* plurality rejected the notion that the Supremacy Clause exempted "treaties and the laws enacted pursuant to them" from "compl[iance] with the provisions of the Constitution." *Id.*, at 16. The only reason the Supremacy Clause does not use the "in pursuance" of the Constitution formulation for treaties that it uses for legislation was to confirm that agreements made by the United States under the Articles of Confederation "would remain in effect." *Id.*, at 16-17 (citing 4 Farrand, Records of the Federal Convention 123 (rev. ed. 1937)). "It would be manifestly contrary to the objectives of those who created the Constitution," noted the plurality,

> as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United

> States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

Id., at 17 (citing Virginia Ratifying Convention, 3 Elliot's Debates 500-519 (1836 ed.)). Accordingly, the *Reid* plurality noted that "[t]his Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty." *Id.* (citing *United States v. State of Minnesota*, 270 U.S. 181, 207-08 (1926); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 242-43 (1872); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21 (1870); *Doe ex dem. Clark v. Braden*, 57 U.S. (16 How.) 635, 657 (1853)). The exemplary language cited by the *Reid* plurality from one such case is particularly instructive:

> The treaty power, as expressed in the constitution, is in terms unlimited *except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States.*

Id. (citing *Geofroy* v. *Riggs*, 133 U.S. 258, 267 (1890)). The language quoted from *Geofroy* speaks of both kinds of restraints against the power of the federal government, the explicit prohibitions of the Bill of Rights and those arising from the nature of the gov-

ernment itself, including apparently that the federal government is one of limited, enumerated powers. *See also id.*, at 22 (discussing that the Necessary and Proper Clause is limited by both kinds of specific restraints on governmental power—the text of the enumerated powers being furthered, and specific prohibitions elsewhere in the Constitution and the Bill of Rights).

The *Reid* plurality did not itself apply that necessary conclusion to *Missouri* v. *Holland* because, at the time, the Court had so broadly interpreted the enumerated powers at issue as to amount to almost no limitation at all:

> To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.

Id., at 18 and n. 35 (citing, *e.g.*, *United States* v. *Darby*, 312 U.S. 100, 124-125 (1941)). By citing *Darby*, however, the *Holland* Court indicated that it was addressing constitutional limits imposed by the scope of other enumerated powers, not asserting that the people had delegated an unlimited authority to the national government via the Treaty Power.

Hence the significance of *Lopez*. The *Reid* plurality's *obiter dictum* with respect to *Holland* must be read in light of *Lopez* and the doctrine of limited, enumerated powers that it confirms. The United States cannot "validly" make a treaty that ignores the structural limits on federal power, any more than it can "validly" make a treaty that ignores the express prohibitions on federal power. *See, e.g.*, Virgin-

ia Ratifying Convention (June 18, 1788), *in* 3 Elliot's Debates 504 (Gov. Randolph) ("When the Constitution marks out the powers to be exercised by particular departments, I say no innovation can take place [by use of the treaty power]"); *id.* (June 19, 1788), in 3 Elliot's Debates 514-15 (Madison) (rejecting the claim that the Treaty Power "is absolute and unlimited," noting that "[t]he exercise of the power must be consistent with the object of the delegation," and that "[t]he object of treaties is the regulation of intercourse with foreign nations, and is external"). More to the point for this case, Congress cannot "validly" exceed its enumerated powers by the simple expedient of relying on a treaty rather than Article I. At least, not without altering the limited "nature of the government itself," *Geofroy*, 133 U.S., at 267, or removing the liberty-protecting "shield" that the structural parts of the Constitution provides, or acting "manifestly contrary to the objectives of those who created the Constitution, . . . let alone alien to our entire constitutional history and tradition," or permitting "amendment of [the Constitution] in a manner not sanctioned by Article V." *Reid*, 354 U.S., at 17, 33.

Thus far, the lower courts have been unwilling to follow the combined reasoning of *Reid* and *Lopez* to reject the broader interpretation that has been given to *Missouri* v. *Holland*. Rather, as manifested by the district court's perfunctory dismissal of the issue below, they apparently feel bound by the view that the entire matter must be dispensed with simply by noting that the challenged Act of Congress was enacted as a "necessary and proper" means of giving effect to a treaty, and therefore no further inquiry into constitutionality is required.

Such a view can yield some very absurd results. A treaty with Austria that included a provision assisting its native son, the naturalized (rather than native-born) citizen and soon-to-be ex-Governor of California, could allow the President, with the advice and consent of the Senate, to excise the native-born citizen eligibility requirement for the presidency, for example. U.S. Const. art. II, § 1, cl. 5. A multinational treaty on age discrimination could likewise excise the 35-year-old age requirement for the same office. *Id.* Another one, such as the Convention on the Elimination of All Forms of Discrimination Against Women, could authorize the provisions of the Violence Against Women Act already held to be unconstitutional in *United States v. Morrison.* Yet another, such as the Convention on the Rights of Children, could authorize the provisions of the Gun Free School Zones Act held constitutionally infirm in *Lopez.* The examples are as numerous as the imagination, and this small sampling should serve to demonstrate just how significant a threat to the notion of limited government there is from the pernicious doctrine that the treaty power is exempt from constitutional constraints on the power of government, or that, contrary to the understanding of the framers of a "treaty" as dealing only with relations between nations, the treaty power can instead be used to alter how a nation deals domestically with its own citizens. *See Geofroy*, 133 U.S., at 266 ("the treaty power of the United States extends to all *proper subjects* of negotiation between our government and the governments of other nations") (emphasis added); *id.* at 267 ("It would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the gov-

ernment or in that of one of the states"); *see also, e.g.*, Virginia Ratifying Convention (June 19, 1788), in 3 Elliot's Debates 514-15 (Madison) (noting that "[t]he object of treaties is the regulation of intercourse with foreign nations, and is external").

Unless the district court's error is at least noted by this Court, a remand for further consideration of the merits by the Court of Appeals may be a colossal waste of judicial resources, yielding no more than a cursory merits determination that provides this Court little assistance in grappling with the very serious constitutional challenge presented by Mrs. Bond. The Third Circuit has already noted that Mrs. Bond has raised important constitutional issues that should require the court to "wade into the debate over the scope and persuasiveness of" *Missouri v. Holland*. Pet.App. 10. A slight nod from this Court would free the Third Circuit and other lower courts to begin that important work in earnest.

B. The Necessary and Proper Clause Does Not Give Congress Carte Blanche to Pass Domestic Legislation in Excess of Constitutional Authority Merely Because Action Was Promised in a Treaty.

Even if the treaty power is itself ultimately held to allow issues to be addressed by the federal government that are not otherwise within the federal government's constitutional powers, such a holding would not answer the analytically distinct question whether a treaty that is not self-executing could authorize Congress to act in excess of the legislative powers assigned to it. Professor Nicholas Rosenkranz's recent article in the Harvard Law Review persuasively argues that such a promise in a treaty

must be read as a commitment to push for a constitutional amendment that would authorize the promised legislation, not as authorization for Congress to adopt unconstitutional legislation. *See* Nicholas Quinn Rosenkranz, "Executing the Treaty Power," 118 Harv. L. Rev. 1867 (2005).

Textually, the Necessary and Proper Clause authorizes Congress:

> To make all Laws which shall be necessary and proper for carrying into Execution . . . [the President's] Power, by and with the Advice and Consent of the Senate, to make Treaties . . . .

U.S. Const. art. I, § 8, cl. 18; art. II, § 2, cl. 2. Professor Rosenkranz carefully points out that, as a simple matter of grammatical construction, Congress has the power to make laws necessary and proper for the President "to make Treaties" (such as appropriating money for diplomats to travel to negotiate a treaty), not to make laws necessary and proper to implement non-self-executing treaties already made. Rosenkranz, *supra*, at 1882-84. As no less a Justice than Joseph Story recognized, "the power is nowhere in positive terms conferred upon Congress to make laws to carry the stipulations of treaties into effect." *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 618-22 (1842).

Justice Holmes's *ipse dixit* in *Missouri v. Holland*, conclusorily stating the opposite, that "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government," 252 U.S., at 432, warrants a more reasoned analysis that Justice Holmes provided. If Holmes

was correct, the treaty power can be used to undo the carefully-wrought edifice of a limited government assigned only certain enumerated powers. That those who drafted and ratified the Constitution intended to bury such a dormant time bomb in their handiwork is too much of a stretch to be seriously entertained. Yet that is precisely the path that the lower courts have embarked upon, via their broad interpretation of this Court's decision in *Missouri v. Holland*. Again, a nod from this Court will invite the lower courts to begin grappling with these constitutional issues in the serious manner they deserve, rather than via *ipse dixit*.

CONCLUSION

The judgment of the court below should be reversed and the matter remand for further consideration of the merits of Mrs. Bond's significant constitutional claims.

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AMICUS CURIAE BRIEF

No. 09-1227

In The
Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE *AMICUS CURIAE* APPOINTED TO DEFEND THE JUDGMENT BELOW

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January 10, 2011

QUESTION PRESENTED

Whether an individual has standing to challenge an Act of Congress implementing an exercise of the Treaty Power on the ground that the law violates the States' sovereignty as recognized in the Tenth Amendment to the Constitution.

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STATEMENT

1. Congress enacted 18 U.S.C. § 229 in order to fulfill treaty obligations of the United States under the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction (Convention). The Convention, which is described in the Brief of the United States (U.S. Br.) at 2-3, was ratified by the Senate in 1997. The Convention and implementing domestic legislation are of worldwide importance.[1] As of August 2010, 188 nations – of the 195 nations that the United Nations officially recognizes – are full signatories to the Chemical Weapons Convention. *See* www.opcw.org/about-opcw. Only Angola, North Korea, Egypt, Somalia and Syria have not signed the treaty; Burma and Israel have signed but not ratified it. *Ibid.* (non-member-states). As of July 2010, the Convention has resulted in about 60% of the declared international stockpile of chemical weapons being destroyed. *Ibid.* (news-publications/publications/facts-and-figures).

a. One of the obligations the United States assumed under the Convention was to enact domestic criminal legislation that prohibits persons anywhere in the United States from engaging in the very activities that the Convention prohibits to the ratifying

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[1] The Preamble to the Convention, explaining the goals and purposes of the Convention, is set forth at Pet. App. 37-38.

nations.[2] To fulfill that treaty obligation, Congress enacted the Chemical Weapons Convention Implementation Act of 1998. The Act mirrors the prohibitions and definitions of the Convention, and indisputably was enacted to fulfill the United States' treaty obligations under the Convention.

Included in the Act are the provisions at issue in this case. First, the Act makes it a federal crime for a person knowingly to, among other things, "produce, otherwise acquire, . . . receive, . . . retain, own, possess, or use . . . any chemical weapon." 18 U.S.C. § 229(a)(1). Second, "chemical weapon" is defined to include a "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter" and "as long as the type and quantity is consistent with such a purpose." 18 U.S.C. § 229F(1)(A) and (7). Third, a "toxic chemical" is defined as a "chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." 18 U.S.C. § 229F(8)(A).

b. It is essentially undisputed that petitioner's campaign against the victim in this case violated the literal terms of 18 U.S.C. § 229. Indeed, petitioner's argument has never been that she did not engage in

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[2] Such an obligation is one that the United States sometimes assumes under international treaties that it ratifies. For other federal criminal statutes enacted at least in part to fulfill treaty obligations, see the Appendix to this brief.

conduct which the statute clearly proscribes. Rather, she challenges the statute solely on the ground that it exceeds the constitutional authority of the United States. Contrary to petitioner's assertions, however, 18 U.S.C. § 229 and the Convention it implements represent far more than the mere "federalization" of state criminal assault law. Although petitioner may not be a professional terrorist and did not, for example, send toxic chemicals through the mail, her challenge to 18 U.S.C. § 229, if successful, could preclude application of the statute in such situations.

2. Petitioner's criminal acts are described in great detail at U.S. Br. 4-6, and this statement will only touch on a few points. First, after learning that her husband had impregnated her best friend, petitioner engaged in a lengthy campaign of vengeance against her then former friend and new mortal enemy. In 2005, petitioner repeatedly threatened the victim by telephone and mail, Pet. App. 2, 65, and ultimately was convicted of criminal charges in state court. *Id.* at 48, 64. Second, apparently undeterred by her state prosecution, petitioner renewed her campaign in late 2006, this time involving at least two dozen different attempts to poison the victim with toxic and potentially lethal chemicals. *Id.* at 2. Third, petitioner was no amateur with chemicals. Indeed, she used her scientific expertise to choose chemicals that she knew could be harmful – even fatal in relatively small amounts – through topical exposure alone, if the victim or her infant child simply touched the powder. *Id.* at 23.

Fourth, petitioner was caught by federal, not state, investigators. After the victim noticed some powder in her mailbox, she notified her letter carrier, who in turn referred her inquiry to the United States Postal Inspection Service. Pet. App. 2-3. After federal postal inspectors installed surveillance cameras around the victim's home, they soon recorded petitioner opening the victim's mailbox, stealing mail, and placing chemicals in and on the victim's car. *Id.* at 3. Federal inspectors then obtained search warrants for petitioner's home and car, which resulted in the discovery of mail stolen from the victim and quantities of two highly toxic chemicals. *Id.* at 3-4.

3. Not surprisingly, a federal grand jury indicted petitioner, charging her with two counts of theft of mail, 18 U.S.C. § 1708, and two counts of possessing and using chemical weapons, 18 U.S.C. § 229(a)(1). J.A. 13-15. Petitioner filed a motion to dismiss the chemical weapons counts of the indictment, arguing that § 229(a)(1) "signals an unwarranted federal intrusion into state law enforcement domain," C.A. App., Vol. I, 42, that could not be justified on the basis of the Commerce Clause, the Treaty Power, or any other authority under the United States Constitution. The government responded that the relevant authority was the Treaty Power, not the Commerce Clause. Government's Response in Opposition to Motion to Dismiss at 7 (Nov. 13, 2007) ("Section 229 was not enacted under the interstate commerce authority but under Congress's authority to implement treaties"); C.A. App., Vol. I, 82 (Defendant's Reply in Support of

Motion to Dismiss) ("the government concedes the point that neither . . . 18 U.S.C. § 229, nor this prosecution can be upheld under the Commerce Clause"; instead, the "government relies exclusively on Congress' Article I, Section 8 authority to pass legislation 'necessary and proper' to implement the exercise of [the Treaty Power]").

The district court denied petitioner's motion to dismiss, concluding that 18 U.S.C. § 229 was enacted "under the necessary and proper clause" to "comply with the provisions of a treaty." Pet. App. 28. Thus, the court pointed out that the "commerce clause is not implicated because of the necessary and proper clause." *Id.* Petitioner entered a conditional guilty plea to all counts, reserving her right to challenge the constitutionality of 18 U.S.C. § 229. *Id.* at 5-6.

4.a. On appeal to the Third Circuit, petitioner argued that the federal government cannot enact legislation pursuant to the Treaty Power in the absence of an independent, Article I, § 8 enumerated power basis for such a law. In other words, petitioner argued that the Treaty Power adds nothing to the enumerated powers of Article I, § 8, and that such a conclusion is compelled by the Tenth Amendment. The government countered that § 229 is valid because it was enacted pursuant to the Treaty Power, relying on the Necessary and Proper Clause.

b. Following oral argument, the Third Circuit asked the parties for supplemental briefing on the following question: "Does appellant, Carol Bond, have

standing to assert that 18 U.S.C. § 229 encroaches on state sovereignty in violation of the Tenth Amendment to the United States Constitution absent the involvement of a state or its instrumentalities?" J.A. 17-18. The government responded first, taking the position that "the government believes that appellant Carol Bond lacks standing to assert an infringement of state sovereignty in violation of the Tenth Amendment." *Id.* at 19. Petitioner then made clear the nature of her challenge to § 229: "In this case, the federal government has embraced a position and rationale whereby it can enter and displace law enforcement functions traditionally reserved to the states by utilization of the Treaty Power. This is the antithesis of federalism expressed in the Tenth Amendment." *Id.* at 31. Thus, she urged the Third Circuit to "recognize her standing to challenge 18 U.S.C. § 229 and this prosecution under the Tenth Amendment." *Id.* at 32.

c. The Third Circuit concluded that petitioner lacked standing to raise a Tenth Amendment claim. Pet. App. 11-16. In a section of the opinion titled "Federalism Challenge," *id.* at 7, the court first described the parties' substantive arguments regarding the scope of the Treaty Power. *Id.* at 8-10. The court then cautioned that, "before we can reach the merits of these arguments, we must ensure that Bond has standing to raise a Tenth Amendment challenge to § 229." *Id.* at 11.

The court first looked to *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939)

(*TVA*), in which "utility companies chartered in Tennessee argued that the sale of electrical power by the federally chartered Tennessee Valley Authority was an impermissible federal regulation of a local matter in violation of the Tenth Amendment." Pet. App. 11. The Third Circuit observed that the "Supreme Court rejected this argument, concluding that the private companies lacked standing to maintain their claims." *Id.* The court rejected petitioner's suggestion that the language regarding standing in *TVA* was dicta, concluding that the Supreme Court addressed both the merits issue and the standing issue, making the latter an alternative holding, not dicta. *Id.* at 12 n.6.

The Third Circuit next observed that the Circuits have split on the question of private-party standing to raise Tenth Amendment claims, with two Circuits allowing such claims and five rejecting them. Pet. App. 12. The court first considered the arguments in favor of ignoring the *TVA* holding and recognizing such standing, identifying two such arguments: (1) standing barriers have been lowered since 1939, making *TVA* obsolete, and (2) *New York v. United States*, 505 U.S. 144 (1992), stated that federalism protects individuals, which at least one Circuit has interpreted to mean that Tenth Amendment claims should be considered assertions of individual rights. Pet. App. 13.

"Contrary to this reasoning," the five Circuits that have rejected "private party standing for Tenth Amendment claims have focused" on several factors,

including (1) the continuing validity of *TVA*, which has never been overruled or disavowed by the Supreme Court, (2) prudential considerations such as precluding individuals from asserting third-party rights (of the States) and avoiding a potentially substantial increase in Tenth Amendment claims, (3) that *New York v. United States* never addressed the question of standing and the Supreme Court has never held that the Tenth Amendment creates rights enforceable by individuals, (4) that a purported Tenth Amendment plaintiff "does not even attempt to argue that her interests are aligned with those of a state," and (5) that individuals who believe an act of the federal government violates the Tenth Amendment can work through local political processes to persuade their State and state officials to challenge such federal actions. Pet. App. 14-16 & n.8. The Third Circuit was "persuaded by the reasoning advanced by the majority" of its sister Circuits, *id.* at 14, and thus held that "we will not reach the merits of Bond's arguments concerning the constitutionality of § 229 under our federal system of government." *Id.* at 15-16.

SUMMARY OF ARGUMENT

I.A. The Court's decision in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939) (*TVA*), relied on the longstanding and still extant notion that third parties generally lack standing to raise the rights of others to hold that private citizens cannot bring the Tenth Amendment claims of

the States. Consequently, *TVA* should be followed, both as a matter of *stare decisis* and because it reached the correct result. The United States appears to agree with those propositions, but incorrectly and too narrowly defines Tenth Amendment claims in order to conclude that petitioner is not asserting third-party standing here. Properly understood, however, this case does not raise an "Article I, § 8" claim that petitioner has standing to bring; rather, she is making a Tenth Amendment claim.

I.B.1. Petitioner is raising a Tenth Amendment claim because she is challenging a federal statute enacted pursuant to a power – the Treaty Power of Article II, § 2 – which the Court has held for 90 years is not limited by the Article I, § 8 powers. Thus, if petitioner is to find a federalism limitation on the scope of the Treaty Power, her claim necessarily must rely on the kinds of considerations that Tenth Amendment claims contemplate; her claim is not merely the flipside or mirror image of a typical challenge to an exercise of Congress's Article I, § 8 enumerated powers. Indeed, petitioner is challenging a statute – 18 U.S.C. § 229 – that is based *solely and exclusively* on the Article II, § 2 Treaty Power, as implemented by the Necessary and Proper Clause.

Whether petitioner has standing to assert her Tenth Amendment claim with respect to 18 U.S.C. § 229 depends on the source of the power she is challenging and any constitutional limitations on the exercise of that power. Thus, to an extent, petitioner's standing may turn on whether her claim is more like

the Tenth Amendment claims in cases like *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997), or more like the Article I, § 8 challenges at issue in cases such as *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), *Gonzales v. Raich*, 545 U.S. 1 (2005), and *United States v. Comstock*, 130 S. Ct. 1949 (2010). The answer, focusing on the scope of the challenged power and the constitutional limitations relevant to the exercise of that power, is that her claim belongs in the *New York-Printz* category, and she thus lacks third-party standing. Reaching that answer, however, requires careful consideration of the nature and scope of the Tenth Amendment, as well as the Constitution's delineation of the Treaty Power.

I.B.2. Actual Tenth Amendment challenges are different than challenges to the Article I, § 8 enumerated powers of Congress. Tenth Amendment claims are characterized by alleged limitations on federal authority even though the subject matter of the law being challenged is indisputably within the powers of the federal government. The Tenth Amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975).

The Court's Tenth Amendment cases make clear that the substantive limitations the amendment imposes on federal power depend on considerations

different than whether Congress has the affirmative authority, for example, to regulate interstate commerce or implement Article I, § 8 enumerated powers through the Necessary and Proper Clause. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Reno v. Condon*, 528 U.S. 141 (2000); *New York*, *supra*; *Printz*, *supra*.

I.B.3. The constitutional text delegating the Treaty Power to the United States and providing for its implementation through the Necessary and Proper Clause plainly refutes any claim that either provision is limited by the Article I, § 8 enumerated powers. Therefore, petitioner's standing to bring her Tenth Amendment claim in this case must be evaluated in light of the constitutional bases for and the nature of the Treaty Power, not by reference to the Article I, § 8 powers of Congress.

Importantly, the Treaty Power resides exclusively in the federal government – in particular the President and the Senate – with Congress authorized to implement treaties by statute (when required for non-self-executing treaties) through the Necessary and Proper Clause. Moreover, Article I, § 10 expressly prohibits the States from exercising the Treaty Power. In numerous respects, the Treaty Power is markedly different than the Article I, § 8 enumerated powers of Congress. Thus, cases that have not questioned an individual's standing to challenge the exercise of an Article I, § 8 power – cases such as *Lopez*, *Morrison*, *Raich* and *Comstock* – do not establish that petitioner

has standing here in the constitutionally distinct and perhaps unique Treaty Power context.

I.B.4. *Missouri v. Holland*, 252 U.S. 416 (1920), held that treaties made pursuant to the Treaty Power "can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal,'" *United States v. Lara*, 541 U.S. 193, 201 (2004), and establishes beyond any dispute that the Article I, § 8 enumerated powers have no relevance to the scope of the Treaty Power. Thus, for 90 years this Court has recognized that the Treaty Power – combined with the Necessary and Proper Clause – permits Congress to legislate on subjects that might not otherwise be within its Article I, § 8 authority.

That conclusion means that there can be no valid claim that the Article I, § 8 enumerated powers of Congress limit the scope of the federal government's exclusive Treaty Power. As a result, petitioner here necessarily must rely on a Tenth Amendment argument, making her claim more like those at issue in *New York* and *Printz*, and less like the Article I, § 8 challenges at issue in *Lopez*, *Morrison*, *Raich* and *Comstock*.

II.A. *Missouri v. Holland* and other Treaty Power cases of the Court also make clear that, in general, a claim that an exercise of the Treaty Power violates the Tenth Amendment – *e.g.*, that a statute implementing treaty obligations invades the States' constitutionally protected prerogatives – is not justiciable. That conclusion flows from the facts that

(1) the Treaty Power is essentially political in nature, as the Founders well recognized, (2) the language delegating the Treaty Power to the federal government is unlimited and there are no explicit constitutional prohibitions on its exercise, and (3) the States are expressly barred from exercising the Treaty Power. The only exception that would allow a Tenth Amendment or federalism challenge to the Treaty Power, an exception arguably implicit in *Missouri v. Holland* itself, is that a State may have standing to bring such a claim.

II.B. In the Treaty Power context, an individual cannot bring a nonjusticiable federalism claim that an exercise of the Treaty Power, or an Act of Congress implementing an exercise of the Treaty Power, intrudes on state sovereignty in violation of the Tenth Amendment; only a State may bring such a claim, if any party can. At most, an individual has standing only to bring a claim that a treaty or its implementing legislation violates individual rights the Constitution expressly guarantees, such as Bill of Rights protections in the Fifth or Sixth Amendments. *Reid v. Covert*, 354 U.S. 1 (1957) (allowing individuals to challenge international executive agreements that purported to abrogate the right to a jury trial for civilians tried in courts martial).

Thus, the Third Circuit correctly addressed the merits of petitioner's claim that 18 U.S.C. § 229 is unconstitutionally vague in violation of the Fifth Amendment's Due Process Clause. But that court also correctly concluded that petitioner lacks standing to

raise a claim that 18 U.S.C. § 229 violates the Tenth Amendment by intruding on constitutionally protected state sovereignty.

* * *

Petitioner and her amici (but not the United States) seek to rewrite almost a century of the Court's settled Treaty Power and Tenth Amendment jurisprudence, in part by trying to disguise petitioner's claim here as nothing more than a typical challenge to an exercise of Congress's enumerated powers under Article I, § 8. Ultimately, however, this case is not about the Article I, § 8 enumerated powers; it is about the Treaty Power and two venerable precedents of the Court that implicate and limit standing in the Tenth Amendment context – *Tennessee Electric Power Co. v. Tennessee Valley Authority* and *Missouri v. Holland*. The Third Circuit's judgment, unlike the arguments of petitioner and her amici, is faithful to the Court's precedents and respects the constitutional uniqueness of the Treaty Power.

ARGUMENT

I. PETITIONER LACKS STANDING UNDER THE PRUDENTIAL RULE AGAINST THIRD-PARTY STANDING.

No one is arguing here that petitioner fails to meet the three requirements for Article III standing (injury in fact, causation, and redressability). Rather, her claim implicates a separate and equally

well-settled, prudential doctrine that generally prohibits third parties from asserting the legal rights of others. If the Tenth Amendment has substantive meaning, then it must protect sovereign interests of the States, not private individuals. Accordingly, private individuals lack standing to assert Tenth Amendment claims, as the Court held in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939) (*TVA*). *TVA* was correctly decided and directly applies here because petitioner is asserting a Tenth Amendment challenge to 18 U.S.C. § 229.

A. Private Third Parties Lack Standing To Bring The Tenth Amendment Claims Of States.

Both in general and in the specific context of a Tenth Amendment claim the Court long has applied a prudential rule against third-party standing. The situation presented in this case falls squarely within both the general and Tenth Amendment-specific prohibitions on third-party standing.

1. *Tennessee Electric Power Co. v. Tennessee Valley Authority* Was Premised On The Longstanding And Extant Prudential Rule Against Third-Party Standing.

A focal point in this case is the Court's decision in *TVA*. Petitioner devotes much of her brief to attacking *TVA* in its entirety. Pet. Br. 17-29. The United States

devotes much of its brief to rewriting *TVA* in an effort to explain more recent decisions of this Court. U.S. Br. 33-43. Neither approach, however, is completely convincing or correct.

At bottom, *TVA* is a relatively simple case. A group of power companies sued to enjoin the federally-chartered Tennessee Valley Authority from generating and selling electric power in the marketplace. Seeking to justify their claim for injunctive relief, the plaintiffs argued (among other theories) that "the acts of the Authority cannot be upheld without permitting federal regulation of purely local matters reserved to the states or the people by the Tenth Amendment." 306 U.S. at 143. By this, it appears that the plaintiffs meant that the Authority's competition with them for the sale of power would necessarily lower the prices they could charge, thus "regulating" the plaintiffs, which they argued could only be done by their respective States.

The Court rejected this facile claim, characterizing the plaintiffs' argument for standing as "saying that competition by an individual or a state corporation is not regulation but competition by a federal agency is." *Ibid.* The part of the opinion in dispute here is just three sentences after the rejection of the plaintiffs' allegation of cognizable injury. Focusing on the merits, the Court declared that the "sale of government property in competition with others is not a violation of the Tenth Amendment." 306 U.S. at 144. But the Court then went on to rule – in what can

only in fairness be characterized as an "alternative" holding, *see, e.g., Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) – that because "there is no objection to the Authority's operations by the states," the private-party plaintiffs, "absent the states or their officers, have no standing in this suit to raise any question under the amendment." *Ibid.*

Although the rule is tersely articulated in *TVA*, and *TVA* was decided prior to most of the elaboration of the current law of standing, the *TVA* rule fully comports with the modern prohibition on third-party standing. The federal courts long have disfavored claims premised "on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499. The basic reasons for the rule are "the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights is present to champion them." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978). That, in fact, is how the United States has explained *TVA* in a previous filing in this Court. *See* U.S. Brief in Opposition, No. 05-1243, *Medeiros v. Sullivan*, 2005 U.S.S.Ct. Briefs LEXIS 2431, at 5 ("The *TVA* rule both protects state sovereignty and reflects the general principle that a plaintiff 'must assert his own legal rights and interests, and cannot rest his claim to relief on the

legal rights or interests of third parties.'") (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).[3]

That the *TVA* rule is a holding and not dicta is incontrovertible in light of other precedent of this Court. *See, e.g., Woods*, 337 U.S. at 537 ("where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum."); *California v. United States*, 438 U.S. 645, 689 n.10 (1978) (White, J., dissenting) ("The usual rule in this Court is that when two independent reasons are given to support a judgment, 'the ruling on neither is *obiter*, but each is the judgment of the court, and of equal validity with the other.'") (citations omitted); *see also Medeiros*, U.S. Brief in Opposition, *supra*, 2005 U.S.S.Ct. Briefs LEXIS 2431, at 4 (the *TVA* holding on standing is not dicta).

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[3] Several Circuits have expressly agreed that the *TVA* holding is well within the mainstream of modern standing doctrine as an application of the rule denying third-party standing. *See, e.g., United States v. Hacker*, 565 F.3d 522, 527 (8th Cir. 2009) (denying Tenth Amendment standing to private plaintiffs "comports with [the] prudential standing principle" that a plaintiff generally cannot rest his claim to relief on the rights of others); *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 761 (10th Cir. 1980) (rejecting private party's standing to bring a Tenth Amendment claim on the basis of the well-established rule that third parties generally may not sue to enforce the rights of others).

2. *TVA* Should Be Followed As A Matter Of *Stare Decisis* And Because Its Result Is Correct.

a. The Court consistently has recognized that "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement . . . the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Duke Power*, 438 U.S. at 80. This important prudential limitation, which the *TVA* Court embraced, protects rights belonging to parties not before the courts: the rule ensures that when such rights are decided, they will have been asserted by the parties most directly affected and thus best situated to advocate their interests and positions before the courts. *Ibid.*

The rule against third-party standing suggests there must be limitations on an individual's standing to raise claims that properly belong to the States. Just as the States generally lack standing to bring claims against the United States on behalf of their citizens on a *parens patriae* basis, *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007),[4] private citizens

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[4] *See also Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982), *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (a "State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens"); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) ("Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the

(Continued on following page)

should lack standing to bring claims against the United States asserting the sovereign interests of the States.

There is no apparent reason why the prudential standing inquiry in this context should not be a two-way street, with the same considerations applicable to both individual and State plaintiffs. Yet, petitioner and her amici argue expressly for a one-way street that flows only in favor of granting standing to individuals to raise Tenth Amendment claims while denying the States standing to raise any individual's claims. A two-way street, however, is precisely the constitutional principle the Court recognized in *TVA*, even if we may debate today whether the Court's decision in 1939 accurately reflects Tenth Amendment doctrine in 2011. Moreover, the Court has continued to recognize in various settings that private individuals lack standing to effectively step into the shoes of state officials, whether such plaintiffs seek to defend state laws when state officials have

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Federal Government"); *Florida v Mellon*, 273 U.S 12, 16-17 (1927); *Massachusetts v Mellon*, 262 U S. 447, 485 (1923) ("It cannot be conceded that a state, as parens patriae, may institute judicial proceedings to protect the citizens of the United States from the operation of statutes thereof"), *cf. Oregon v Legal Servs. Corp.*, 552 F.3d 965, 970 (9th Cir. 2009) (state cannot bring even a Tenth Amendment claim where it asserts no injury independent of injury to its private citizens)

chosen not to do so, or to compel the States to enforce their laws or to do so in particular ways.[5]

b. The concerns that animate the general prohibition on third-party standing apply with equal if not greater force in the context of Tenth Amendment claims. The States have strong interests in initiating and controlling litigation that involves constitutional challenges to federal-state relations. Such suits can be highly consequential to the States, and can require significant expenditures of state resources.

Furthermore, it is not apparent that any private citizen plaintiff has ever prevailed on the merits of a Tenth Amendment-type challenge. Given the lack of meritorious private-party claims, it seems unlikely that the States generally are refusing to prosecute valid Tenth Amendment claims. On the other hand, permitting private citizens to bring Tenth Amendment claims with no constraint may lead to negative consequences for the States. For example, even

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[5] *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 65-66 (1997) (expressing "grave doubts whether" private plaintiffs could ever have standing to defend state laws that state officials choose not to defend); *Diamond v. Charles*, 476 U.S. 54, 64-65 (1986) (denying a private party standing to defend a state law declared unconstitutional or in general to seek to compel state officials to enforce a law or adopt any particular framework for enforcing laws); *Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985) (citizens generally must rely on their elected officials' discretion in determining whether to pursue legal claims).

though a State may not be a party to or intervene in such a private citizen suit, decisions in such cases will have *stare decisis* effect. That fact may well limit the States' future options, both in terms of claims to bring and the forum in which to bring them. Ultimately, a *laissez faire* standing rule that openly welcomes and invites unmeritorious private citizen Tenth Amendment suits hardly furthers the States' sovereign interests.

The Circuits, including the Third Circuit in this case, have identified at least four other reasons for maintaining the rule that individuals lack third-party standing to raise Tenth Amendment claims.

First, one reason for denying standing here is part of the justification for the general rule against third-party standing: the prudential consideration of limiting the number of lawsuits and litigants in already burdened federal courts. Allowing individuals to raise Tenth Amendment claims necessarily will increase the number of such claims brought to the federal courts, and perhaps significantly so. *Medeiros v. Vincent*, 431 F.3d 25, 36 (1st Cir. 2005) ("if private citizens possess standing to prosecute Tenth Amendment claims, it is not difficult to envision a substantial increase in such litigation before the federal courts"). In a related vein, private third-party standing could lead to actual frustration of the very state sovereignty such plaintiffs claim standing to assert, including intrusive *and* disruptive discovery regarding the policy decisions of state officials. *Ibid.* It would be ironic to grant private citizens standing to raise claims asserting the prerogatives of the States

only to have the litigation of those very claims disrupt the operation of state and local governments.

Second, several Circuits have disagreed with the Seventh Circuit's conclusion that *New York v. United States*, 505 U.S. 144 (1992), effectively held that federalism rights are individual rights that individuals have standing to enforce. *See Gillespie v. City of Indianapolis*, 185 F.3d 693, 703 (7th Cir. 1999) (*New York* limited *TVA* by establishing that "in making Tenth Amendment claims, [an individual] actually is asserting his own rights"). To the contrary, other Circuits have pointed out that this Court never addressed the question of standing in *New York v. United States*. *See, e.g.*, *Brooklyn Legal Servs.*, 462 F.3d 219, 236 (2d Cir. 2006) ("Further, *New York* does not support overruling *Tenn. Elec.* The issue of Tenth Amendment standing is not even indirectly addressed in *New York*"); *Medeiros*, 431 F.3d at 34 ("since *New York* involved a claim asserted only by a state, the question of private-party standing under the Tenth Amendment was never at issue; indeed the word 'standing' was never mentioned").

But, perhaps more importantly, the language in *New York* on which the Seventh Circuit relied was a discussion relating to an issue completely separate and distinct from standing: whether a *State's* previous acquiescence in a federal program prohibits that State from later challenging the federal program on Tenth Amendment grounds, *i.e.*, a question of waiver of rights. *See New York*, 505 U.S. at 181-182; *Brooklyn Legal Servs.*, 462 F.3d at 236 ("The quoted passage

upon which the district court relied concerns the *states'* ability to *waive* Tenth Amendment violations and has nothing to do with standing"); *Medeiros*, 431 F.3d at 35 (the "specific focus" of the discussion in *New York* was whether a State could assert a Tenth Amendment claim "where a previous administration of that state had initially acquiesced in the commandeering, *or* whether the Tenth Amendment claim had been waived").

Third, some Circuits have opined that granting individuals third-party standing to assert the interests of the States would make the most sense, if ever, in cases where the third-party plaintiff's interests are aligned with the States' sovereign interests. *See, e.g.*, *Hacker*, 565 F.3d at 527 ("Hacker has not even argued that his interests are aligned with those of a state"); *United States v. Parker*, 362 F.3d 1279, 1284 (10th Cir. 2004) ("private plaintiffs do not have standing to bring Tenth Amendment claims when their interests are not aligned with the state's interests"). It would be counterproductive to allow plaintiffs to claim standing on the ground that a State's sovereign interests are being violated when the State itself may be opposed to the plaintiff's claim. Such a result would not square with traditional notions of appropriate third-party standing situations.

Finally, some Circuits have pointed out that not all potential constitutional violations are necessarily cognizable in a lawsuit by private citizens, and other

processes may be available to address such potential violations. In fact, "the State represents the interests of its citizens in general, and, if it refuses to prosecute a viable Tenth Amendment claim, the citizens of that state may have recourse to local political processes to effect change in the state's policy of acquiescence. If the Tenth Amendment is not waivable, individuals could petition state officials for redress at any time." *Medeiros*, 431 F.3d at 35.

Indeed, the *New York* non-waiver rule enhances the States' ability to protect their sovereign interests, while an expansive rule allowing private third-party standing to assert such claims could weaken state prerogatives. Particularly when the private party's interests are not aligned with those of the State, as may well be true in this very case (Pennsylvania did, after all, prosecute petitioner once, but that effort failed to stop her), private party suits have the potential to frustrate and undermine state policies and decisions. *New York* itself is an example of a State changing course, presumably as a result of activity through traditional political processes, to cease its acquiescence in a Tenth Amendment violation and instead bring a lawsuit.

Furthermore, even on the merits, the *New York* proposition – that federalism protects individual rights – does not answer the standing question. It is certainly arguable that *all* constitutional provisions protect individual rights in some metaphysical sense, but the Court has never held that individuals can enforce all constitutional provisions. In fact, some

provisions cannot be enforced by individuals or the States, such as the guarantee to the States of a republican form of government in Article IV, § 4. *See, e.g.*, *Luther v. Borden*, 48 U.S. 1, 42 (1849); *Taylor v. Beckham*, 178 U.S. 548, 578 (1900); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 149-52 (1912). Thus, the proposition that a constitutional provision in some sense protects individual rights does not in and of itself answer the question whether a particular plaintiff has standing to bring a claim under that provision. *Cf. Hein v. Freedom from Religion Found.*, 551 U.S. 587 (2007) (rejecting a taxpayer's claim of standing to bring an Establishment Clause challenge to a presidential initiative).

Thus, it is critically important to evaluate the nature and basis of petitioner's actual claim in this case in order to determine whether she has standing. As the next section explains, petitioner actually is raising an unusual challenge to the constitutionally unique Treaty Power, not a typical "Article I" claim as petitioner and the United States assert.

B. Petitioner Is Asserting A Tenth Amendment Claim That Is Barred By The Prudential Rule Against Third-Party Standing.

1. Determining The Nature Of Petitioner's Claim Requires Consideration Of The Source Of The Challenged Power And Any Constitutional Limitations On The Exercise Of That Power.

Once *TVA* is correctly understood as an instance of the prudential rule against third-party standing, the critical question becomes defining a "Tenth Amendment" claim for purposes of applying the rule. Petitioner argues that there is no difference between Tenth Amendment claims and challenges to congressional power under Article I, § 8, with the result that the rule against third-party standing would no longer apply in this context, ever. Pet. Br. 27-29. The United States distinguishes between Tenth Amendment and Article I claims, but defines the former category very narrowly to include only the Court's decisions in *New York* and *Printz*. U.S. Br. 14-16, 33-42.

a. Petitioner's approach fails even to explain the rationales of *New York* and *Printz*, because in both instances Congress clearly had the Article I subject-matter power to legislate regarding the disposal of hazardous wastes and commercial transactions involving firearms. What thwarted the federal legislation in

both instances was something separate and apart from the limits of Article I, § 8 – it was the Tenth Amendment. Furthermore, as explained below, this case does not even involve the direct exercise of delegated Article I powers. Instead, the statute challenged here was enacted solely and exclusively on the basis of the Treaty Power, an Article II power, as implemented by the Necessary and Proper Clause.

Finally, although neither *New York* nor *Printz* addressed standing, or even so much as hinted at the question raised in this case, it is notable that both cases involved state or local government parties as plaintiffs, precisely the entities or persons in the best position to advocate sovereign interests. Ultimately, petitioner's "mirror image" theory has two fundamental flaws: (1) as explained below, this is a Treaty Power case, not an Article I, § 8 enumerated powers case; and (2) if there is no difference between Article I and Tenth Amendment claims, then petitioner's theory suggests that *New York* and *Printz* were really Article I cases, and the Tenth Amendment has no substantive significance.

b. The position the United States takes in this case also suffers from the first flaw (failing to regard the Treaty Power as any different than the Article I, § 8 enumerated powers of Congress), but the United States grudgingly gives the Tenth Amendment a little substance. In particular, the United States argues that Tenth Amendment claims are only those that allege the federal government "has intruded upon a specific aspect of state sovereignty by, for example,

directing the conduct of state legislators or executives." U.S. Br. 14. The United States argues that *TVA* is consistent with this view of the Tenth Amendment, U.S. Br. 37, asserting that the unfair competition claim by the plaintiffs in that case "alleged interference with a specific aspect of state sovereignty." *Id.* at 37 n.14.

It is not clear whether the United States' proposed standard – that a Tenth Amendment claim is characterized by federal "interference with a specific aspect of state sovereignty" – would ever limit Tenth Amendment standing to state or local governments and their officials in contexts not deemed by this Court to involve "commandeering" of state sovereignty. *See, e.g.*, *Reno v. Condon*, 528 U.S. 141 (2000); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Nor is it clear that the United States' proposed standard really explains several Court of Appeals decisions finding no Tenth Amendment standing, cases that the United States attempts to justify as correctly decided. U.S. Br. 39 n.16. In any event, the real question remains: what is a Tenth Amendment claim?

c. *Amicus Curiae* appointed to defend the judgment below respectfully suggests that the answer most consistent with all of the Court's decisions depends on identifying (1) the precise federal power being challenged and (2) the express or structural constitutional limits, if any, on that power. The source of the power matters because it identifies the nature and purpose of the power being exercised, and also

may suggest limits on the power, if any. Even more clearly, an explicit constitutional limit on federal power can define the nature of a plaintiff's claim that the scope of federal power has been exceeded.

If the source of federal power is one of the Article I, § 8 enumerated powers and the claim is that the enumerated power is not broad enough to authorize the particular statute, the claim is a true Article I, § 8 claim. The very nature of the source of power and the absence of any explicit constitutional limits tell us that the claim involves the scope of Article I, § 8 itself. Thus, the plaintiff need only satisfy the usual Article III standing requirements. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *Gonzales v. Raich*, 545 U.S. 1 (2005). Similarly, if the claim is that Congress is exceeding the scope of its Article I, § 8 enumerated powers when it relies on the Necessary and Proper Clause, the challenge is a true Article I claim. *See, e.g.*, *United States v. Comstock*, 130 S. Ct. 1949 (2010).

But when the federal power derives from a source other than Article I – as is true in this case – it is not appropriate to label the claim as an "Article I" challenge. Nor do the same standing considerations necessarily apply in evaluating the scope of a non-Article I, § 8 power. The power at issue in this case – the Treaty Power – is an excellent example of this proposition. As explained below, the Court has made clear for 90 years that the Treaty Power is not limited by the scope of the Article I, § 8 powers, making it

implausible to argue that a challenge to the Treaty Power is really an Article I challenge. *Missouri v. Holland*, 252 U.S. 416 (1920). Yet, that is precisely the argument that the United States makes in this case, and effectively the argument that petitioner makes.

Furthermore, the source(s) of any limits on a federal power naturally affect the characterization of the claim. Thus, if an asserted limitation derives from a separate constitutional source (*i.e.*, a constitutional provision distinct from the power-granting provision), then that prohibition or limitation necessarily also defines the claim. For instance, if Congress used the commerce power to regulate commercial speech and a business challenged the law as infringing on freedom of speech, such a claim would not be characterized as an "Article I" claim. Rather, the courts would treat it as a First Amendment claim.

The same is true of Tenth Amendment claims. If the alleged limitation on federal power is derived from a constitutional provision other than the one granting the power – as it necessarily must be in the Treaty Power context, as explained below – then the claim is characterized by the provision limiting the power, not the provision granting power. Here, petitioner has expressly argued that 18 U.S.C. § 229 violates the interests of the States, expressly relying on the Tenth Amendment as a limitation on the Treaty Power.

This analysis explains the results in *New York* and *Printz*, and is directly supported by the Court's treatment of the Taxing and Spending Powers, which are Article I, § 8 powers. The Court has made clear that the Spending Power, which is an Article I, § 8 power, is limited only by express prohibitions in the Constitution, not by other Article I, § 8 enumerated powers. *South Dakota v. Dole*, 483 U.S. 203, 208 (1987) (spending power limited only by an "independent [constitutional] bar");[6] *Sabri v. United States*, 541 U.S. 600, 607-08 (2004) (Spending Power laws need not satisfy the requirements of *United States v. Lopez*, *United States v. Morrison*, or other commerce power cases). This demonstrates that even some challenges to Article I powers are really based on non-Article I limitations, not on any limit inherent in Article I, § 8.

Similarly, so long as Congress is actually imposing a "tax" and not a "penalty," the Taxing Power is unconstrained by other Article I, § 8 powers. *See, e.g.*,

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[6] Chief Justice Rehnquist, writing for the Court, explained that "[t]he 'independent constitutional bar' limitation on the spending power is not [as South Dakota argued] a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly" *South Dakota*, 483 U.S. at 203-04. Rather, the independent constitutional bar limitation means that the spending power "may not be used to induce the states to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress's broad spending power." *Id.* at 210.

United States v. Kahriger, 345 U.S. 22, 31 (1953) ("Unless there are [penalty provisions], courts are without authority to limit the exercise of [Congress's] taxing power"), *overruled on other grounds in Marchetti v. United States*, 390 U.S. 39 (1968); John E. Nowak & Ronald D. Rotunda, *Principles of Constitutional Law* 113 (4th ed. 2010) ("If there is a theoretical possibility that the federal statute might produce some income for the federal government, the Court should find the statute to be within the federal taxing power"); *cf. Flast v. Cohen*, 392 U.S. 83, 105 (1968) (explaining a taxpayer's lack of standing in *Massachusetts v. Mellon*, 262 U.S. 447 (1923) as follows: "In essence, [the plaintiff] was attempting to assert the States' interest in their legislative prerogatives and not [her] interests in being free of . . . specific constitutional limitations imposed upon Congress' taxing and spending power."). Again, the Taxing and Spending Powers cases demonstrate that even some "Article I" claims – as the United States and others here style them – actually depend on non-Article I limitations, and thus it is not really accurate to label such challenges as "Article I" claims.

As explained below, applying this analysis to petitioner's challenge to 18 U.S.C. § 229, it is difficult to conclude that petitioner is raising anything other than a Tenth Amendment claim here.

2. Petitioner Is Making A Tenth Amendment Challenge To The Treaty Power.

a. In a case like this, the inquiry into petitioner's third-party standing necessarily implicates the merits of her claim. "Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted." *Warth*, 422 U.S. at 500. Because "'standing and the merits are inextricably intertwined'" in many third-party standing situations, *e.g.*, *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243 n.5 (1983) (quoting *Holtzman v. Schlesinger*, 414 U.S. 1316, 1319 (1973)), the Court has made clear that "the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500. Thus, the remainder of this brief addresses petitioner's claim of standing in light of the nature of her challenge to the constitutionality of 18 U.S.C. § 229.

b. Petitioner, unlike the United States and her amici, at least acknowledges both that she is challenging 18 U.S.C. § 229 on Tenth Amendment grounds and that the statute is based on a non-Article I power – the Treaty Power. *See* Pet. Br. 12 ("On appeal, petitioner reiterated her constitutional objections, arguing that the application of 18 U.S.C. § 229 reflected a 'massive and unjustifiable expansion of federal law enforcement into [a] state-regulated domain.' . . . As petitioner explained, Congress should

not be permitted to '[u]tiliz[e] the Treaty Power to create plenary federal criminal jurisdiction over conduct that federal law enforcement could not otherwise reach.'") (internal citations omitted). Thus, according to petitioner's own characterization of her claim in the Third Circuit, this case is not just another example of a typical challenge to a federal statute on the ground that the law exceeds the scope of Congress's enumerated powers under Article I, § 8.

In contrast to petitioner's characterization, however, the United States somewhat vaguely and perhaps inaccurately asserts that "[p]etitioner appealed her conviction and sentence on numerous grounds, including that Congress exceeded its authority under Article I of the Constitution. . . ." U.S. Br. 2. Petitioner's amici make similar claims about the nature of this case. *See, e.g.*, Brief for the Six Amici States 13-16 (arguing that all Article I and Tenth Amendment claims are "mirror images" of each other); Brief of Amicus Curiae Center for Constitutional Jurisprudence and the Cato Institute 4 ("The Tenth Amendment Argument is Simply the Flip Side of the Enumerated Powers Coin.").

c. Characterizing this case as involving a challenge to the Article I, § 8 enumerated powers of Congress, however, fails to describe precisely and accurately the arguments made in the lower courts and the grounds on which this case was resolved in those courts. Beginning with petitioner's motion to dismiss the indictment, this case effectively has been argued and resolved as a Tenth Amendment challenge

to a statute that the government defended *solely* on the basis of the Treaty Power, as implemented by Congress in reliance on the Necessary and Proper Clause.[7] Petitioner herself made that clear in her supplemental brief filed at the Third Circuit's request after oral argument: "In this case, the federal government has embraced a position and rationale whereby it can enter and displace law enforcement functions traditionally reserved to the states by utilization of the Treaty Power. This is the antithesis of federalism expressed in the Tenth Amendment." J.A. at 31. Thus, petitioner urged the Third Circuit to "recognize her standing to challenge 18 U.S.C. § 229 and this prosecution under the Tenth Amendment." *Id.* at 32.

It is correct that in the lower courts petitioner at times invoked Article I, § 8 enumerated powers in arguing her Tenth Amendment challenge to 18 U.S.C. § 229, for example by arguing that the statute is

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[7] *See* C.A. App., Vol. I, 42 (Defendant's Motion to Dismiss, ¶ 4) ("As indicated by its application to this case, the virtually unbounded scope of 18 U.S.C. § 229 . . . signals an unwarranted federal intrusion into state law enforcement domain."); Government's Response in Opposition to Motion to Dismiss at 7 (Nov. 13, 2007) ("Section 229 was not enacted under the interstate commerce authority but under Congress's authority to implement treaties"); C.A. App., Vol. I, 82 (Defendant's Reply in Support of Motion to Dismiss) ("the government concedes the point that neither . . . 18 U.S.C. § 229, nor this prosecution can be upheld under the Commerce Clause", instead, the "government relies exclusively on Congress' Article I, Section 8 authority to pass legislation 'necessary and proper' to implement the exercise of [the Treaty Power]").

unconstitutional because it does not require proof of a nexus to interstate commerce. But even petitioner recognized that the federal government expressly disavowed *any* reliance on Article I, § 8 enumerated powers in defending the statute. *See* n.7, *supra*. Furthermore, the District Court upheld the statute by relying *solely* on the Treaty Power and the Necessary and Proper Clause. Pet. App. 28 (It is clear that the statute was enacted to "comply with the provisions of a treaty. . . . The commerce clause is not implicated. . . . Congress does not purport to enact the statute pursuant to the commerce clause.").

The government's defense of the statute in the Third Circuit also relied solely on the Treaty Power – not the commerce power or any other Article I, § 8 enumerated power. *See* U.S. Br. in No. 08-2677, *United States v. Bond*, at 23-32. Thus, any suggestion or implication that petitioner's challenge here is the same as the Article I, § 8 enumerated powers challenges raised and decided in cases such as *United States v. Lopez*, *United States v. Morrison*, and *Gonzales v. Raich* is inaccurate and misleading.

d. Nor is this case analogous to the Court's recent decision in *United States v. Comstock*, which decided an Article I, § 8 challenge in a setting where the individual argued that, because Congress could not accomplish the law's purposes based on any Article I, § 8 enumerated power, it could not rely upon the Necessary and Proper Clause to do so. Here, the case before the Court involves a Tenth Amendment challenge to the Treaty Power and the second half of

the Necessary and Proper Clause which expressly provides authority to implement non-Article I powers like the Treaty Power. Thus, this case does not involve either a *Comstock* situation, or a commerce power challenge like in *Lopez*, *Morrison*, or *Raich*, as further explained below.

3. The Treaty Power Is Unique And Implicates Different Standing Considerations Than Article I, § 8 Enumerated Powers.

The Treaty Power is unique under the Constitution in ways that bear on the standing inquiry. Unlike the Article I, § 8 powers, "[t]he treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, 'to make Treaties.' But, as Justice Holmes pointed out, treaties made pursuant to that power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'" *Lara*, 541 U.S. at 201 (quoting *Missouri*, 252 U.S. at 433).

a. The affirmative Treaty Power appears in Article II, § 2, which provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided that two thirds of the Senators present concur." But importantly, and unlike the Article I, § 8 enumerated powers, the Constitution also expressly imposes a

prohibition *on the States regarding the Treaty Power*: "No State shall enter into any Treaty, Alliance, or Confederation." Art. I, § 10, cl. 1.

This prohibition ties directly into the Tenth Amendment, which declares that "[t]he powers not delegated to the United States, *nor prohibited by it to the States*, are reserved to the States respectively, or to the people." U.S. Const. amend. X (emphasis added). Thus, when it comes to the Treaty Power, the constitutional text of these several provisions plainly suggests that there is no Treaty Power to be "reserved to the States." *Missouri v. Holland*, 252 U.S. 416 (1920); *see also* Louis Henkin, *Foreign Affairs and the United States Constitution* 191 (2d ed. 1996) ("Since the Treaty Power was delegated to the federal government, whatever is within its scope is not reserved to the states"). Thus, the essential nature of the Treaty Power alone distinguishes this case from an Article I challenge in the style of *Lopez*, *Morrison*, or *Raich*.

b. Constitutional text also distinguishes petitioner's challenge from the situation the Court recently addressed in *United States v. Comstock*. The Necessary and Proper Clause makes clear that the Treaty Power is distinct from and different than the Article I, § 8 enumerated powers. That clause expressly distinguishes these powers, declaring that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing [Article I, § 8] Powers, *and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer*

thereof." Art. I, § 8, cl. 18 (emphasis added). Were confirmation of the plain meaning of the Clause's text required, such is provided by direct evidence of the Founders' intent: "The 'necessary and proper' clause originally contained expressly the power 'to enforce treaties' but [that language] was stricken as superfluous." Henkin, *Foreign Affairs*, *supra*, 204 & n.111 (citing 2 M. Farrand, *The Records of the Convention of 1787*, at 382 (rev. 1966)).

Inescapably, the plain text of the Necessary and Proper Clause refutes petitioner's contention that when Congress relies on that clause to implement the Treaty Power such enactments are limited by the scope of Congress's enumerated powers under Article I, § 8. Such an argument cannot be squared with the second half of the Clause, and no academic commentary or wishful thinking can amend the clear language of the Clause. Thus, not only does the Constitution not say what petitioner and her amici suggest in this regard; it expressly refutes their position.

c. One other constitutional provision further suggests the uniqueness of the Treaty Power: the Supremacy Clause, which expressly recognizes and emphasizes the Treaty Power as a power distinct from the enumerated powers of Congress. That Clause declares that the Constitution, laws of the United States, "and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the

Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2.

d. In light of these explicit and clear constitutional provisions, it is no surprise that the Court's decisions for more than 200 years have recognized the unique nature of the Treaty Power. Indeed, "[n]o treaty has ever been struck down on federalism grounds." Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 Colum. L. Rev. 403, 413 (2003).

Ultimately, the constitutional uniqueness of the Treaty Power counsels against widely available standing. Hindrance of the Treaty Power threatens uniquely national interests, including powers of both the President and the Senate to guide foreign policy and interactions on the world stage, as well as the authority of Congress to implement the obligations the nation undertakes pursuant to treaties. In many respects, the Treaty Power more closely resembles the Article IV, § 4 guarantee to the States of a republican form of government than it does any Article I, § 8 enumerated power.

In fact, there are plausible arguments – based on constitutional text and history, as well as 200 years of the Court's Treaty Power cases – that the scope of the Treaty Power is not a justiciable question. Consequently, the scope of Congress's authority to implement that power may also be a nonjusticiable question, as discussed in Part II of this brief. At a minimum, the scope of that congressional power must be evaluated

very differently and with different considerations than challenges to the Article I, § 8 enumerated powers.

Consequently, standing to challenge exercises of the Treaty Power is more limited than in the Article I, § 8 context. In fact, if Treaty Power questions are nonjusticiable, then perhaps not even the States have standing to challenge the scope of the Treaty Power. But if any party has standing to raise a Tenth Amendment claim regarding the Treaty Power, it is the States, not individual citizens.

4. The Treaty Power Is Not Limited By The Enumerated Powers Of Congress, And Thus A Tenth Amendment Challenge To The Treaty Power Is Not Simply The "Flipside" Of An Article I, § 8 Claim.

a. A Tenth Amendment challenge to a treaty or its implementing legislation is not the "flipside" or "mirror image" of an enumerated power (Article I, § 8) challenge. Rather, a challenge to the Treaty Power necessarily is a Tenth Amendment sovereignty claim, more akin to the commandeering claims asserted in *New York* and *Printz* than to the Article I, § 8 claims advanced in *Lopez*, *Morrison*, *Raich*, and *Comstock*.

The Court has recognized that treaties "can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'" *Lara*, 541 U.S. at 201 (quoting *Missouri*, 252 U.S. at 433). Thus, the

Article I, § 8 enumerated powers of Congress simply do not limit the scope of the Treaty Power. *See United States v. Belmont*, 301 U.S. 324, 331-32 (1937); *De Geofroy v. Riggs*, 133 U.S. 258, 266-67 (1890). *See also United States v. Pink*, 315 U.S. 203, 230-31, 242 (1942) (Frankfurter, J., concurring) ("In our dealings with the outside world the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states"). In fact, the Court "frequently has held that cases presenting issues related to the conduct of foreign affairs pose political questions." Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 140 (3d ed. 2006).

Further, the Court's cases are replete with instances where subjects traditionally reserved to the States are trumped by a treaty or its implementing legislation. *See, e.g., Zschernig v. Miller*, 389 U.S. 429, 440 (1968) (state inheritance statutes must cede to foreign policy); *Belmont*, 301 U.S. at 331 (property rights); *Asakura v. City of Seattle*, 265 U.S. 332, 341-43 (1924) (licensing of pawn brokers); *Ware v. Hylton*, 3 U.S. 199, 236-37 (1796) (creditor's rights).[8] Such case law follows from (1) the delegation of the

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[8] *See also De Geofroy*, 133 U.S. at 270-72 (property inheritance); *Hauenstein v. Lynham*, 100 U.S. 483, 486-87 (1879) (state laws on property inheritance). *Cf. El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 175 (1999) (this country's "home-centered preemption analysis . . . should not be applied, mechanically, in construing our international obligations.")

entire Treaty Power to the national government, (2) the Article I, § 10 express prohibition on the States exercising the Treaty Power, and (3) the Tenth Amendment's explicit disclaimer of any reservation of power regarding subjects that the Constitution expressly prohibits the States from exercising, like the Treaty Power. Art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation"); U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

b. *Missouri v. Holland* is key to properly framing petitioner's claim in this case. In 1916, the President entered a treaty with Great Britain concerning migratory birds in North America.[9] To implement the treaty, Congress enacted the Migratory Bird Treaty Act, a federal law that prohibited the hunting of migratory birds covered by the treaty except as permitted by the regulations of the Secretary of Agriculture. After two Missouri residents were indicted for violating the Act, the State of Missouri interceded and challenged the Act on the ground that it invaded the sovereign rights of the State in violation of the Tenth Amendment. 252 U.S. at 430-31; *United States v. Samples (Missouri v. Holland)*, 258 F. 479, 479-80 (W.D. Mo. 1919).

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[9] Convention between the United States and Great Britain for the Protection of Migratory Birds, U.S.-Gr. Br., Aug. 16, 1916, 39 Stat. 1702.

The Court emphatically rejected the Tenth Amendment argument, declaring that, "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. at 432. Acknowledging that a prior act regulating the hunting of migratory birds was held to be outside of Congress's enumerated powers under Article I, § 8, the Court directly rejected the proposition that "what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do." *Id.* To the contrary, as the Court explained:

> It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found. . . . No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.

Id. at 433, 434 (citation omitted).[10]

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[10] Constitutional scholars across the spectrum view *Missouri v. Holland* as meaning precisely what it says. *See, e.g.*, Chemerinsky, *Constitutional Law: Principles and Policies* 371 ("treaties cannot be challenged as violating the Tenth Amendment and

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Thus, the Chemical Weapons Convention and its implementing legislation, 18 U.S.C. § 229, are not subject to any reserved authority of the States, or to the Article I, § 8 enumerated powers of Congress. That conclusion necessarily implicates petitioner's standing to challenge these laws, because her claim cannot be an Article I, § 8 challenge, meaning that the standing of individuals in cases such as *Lopez*, *Morrison*, *Raich*, and *Comstock* provide no comfort to her. Those cases are all readily distinguishable.

c. Reliance on the Necessary and Proper Clause as the vehicle for Congress to enact 18 U.S.C. § 229 is of no moment. As explained above, the text of the Clause makes clear that Congress has the power to make laws necessary and proper to execute "the foregoing Powers" of Article I, § 8, such as the power to regulate interstate commerce, *and* "all other Powers vested by this Constitution in the Government of the United States," such as the power to make treaties. Art. I, § 8, cl. 18. Thus, the plain language of the Clause refutes any notion that a statute enacted to implement a treaty must also be necessary and

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infringing state sovereignty *Missouri v. Holland* was decided in 1920, during an era when the Court aggressively used the Tenth Amendment to safeguard states from federal encroachment"); John E. Nowak & Ronald D Rotunda, *Principles of Constitutional Law* 125 (4th ed. 2010) (describing *Missouri v. Holland* as holding that "the treaty power is specifically delegated to the federal governments [sic] and the Tenth Amendment only purports to apply to nondelegated powers Thus, the Tenth Amendment does not limit the treaty power.").

proper to regulate interstate commerce. *Cf. Sabri*, 541 U.S. at 607-08 (rejecting claim that a Spending Power statute must satisfy the commerce power test of *Lopez* and *Morrison*).

Moreover, petitioner has not and cannot plausibly argue that 18 U.S.C. § 229 is not rationally related to implementing the Chemical Weapons Convention. Thus, the statute cannot exceed the scope of the Necessary and Proper Clause. *Cf. Comstock*, 130 S. Ct. at 1956 (citing *Sabri*, 541 U.S. at 605).

d. For 90 years the Court has recognized that the Treaty Power – combined with the Necessary and Proper Clause – permits Congress to legislate on subjects that might not otherwise be within its Article I, § 8 authority. That conclusion means that there can be no valid claim that the Article I, § 8 enumerated powers of Congress limit the scope of the federal government's exclusive Treaty Power.[11] Thus, petitioner's challenge to an Article II power cannot be simply the "flipside" of an Article I, § 8 claim. Further, if there is any Tenth Amendment claim on behalf of the States in this context, petitioner lacks standing to bring such a claim.

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[11] *See Bell v. Hood*, 327 U.S. 678, 682 (1946) ("a suit may be dismissed for want of jurisdiction where the alleged claim under the Constitution . . . is wholly insubstantial and frivolous"); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993) (quoting *Bell v. Hood* and noting that a decision by the Court can render previously debatable constitutional claims "wholly insubstantial and frivolous")

II. PETITIONER'S TENTH AMENDMENT CLAIM ALSO WAS PROPERLY DISMISSED BECAUSE IT IS NONJUSTICIABLE.

A. Treaty Power Claims In General Are Nonjusticiable.

Ultimately, petitioner's Tenth Amendment claim presents a nonjusticiable question. Although an individual may challenge a treaty or an implementing statute on the grounds that it violates a constitutional prohibition guaranteeing individual rights, at most only a State has standing to assert a Tenth Amendment challenge to the Treaty Power.

1. The Court long has recognized the nonjusticiable character of challenges to the exercise of foreign relations powers by the political branches of the national government. *See Marbury v. Madison*, 5 U.S. 137, 165-66 (1803) ("the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience").[12] Accordingly,

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[12] *See also Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("even if courts could require full disclosure [of secret intelligence], the very nature of executive decisions as to foreign policy is political, not judicial. . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."); *Guar Trust Co of New York v. United States*, 304 U.S. 126, 137-38 (1938) ("What government is to be regarded here as representative of a foreign sovereign state is a

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challenges to the Treaty Power generally present political questions. *Eyde v. Robertson*, 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.").[13]

2. The general political nature of foreign affairs and the exercise of the Treaty Power were acknowledged in *Baker v. Carr*, 369 U.S. 186, 211-13 (1962), where the Court identified the characteristics

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political rather than a judicial question. . . ."); *Ting v United States*, 149 U.S. 698, 705-07, 712-13 (1893) (matters concerning immigration are concerns of the political departments of the government, not the judicial branch)

[13] *See also United States v. Pink*, 315 U.S. 203, 229 (1942) (which government is to be recognized under a treaty as a foreign sovereignty), *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-68 (1903) (issues concerning treaties with Indian tribes); *United States v. Sandoval*, 167 U.S. 278, 290-91, 293-94 (1897) (resolution of disputes over private property by U.S.-Mexican treaty); *Ping v United States*, 130 U.S. 581, 602-03 (1889) (congressional repeal of a treaty); *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888) (congressional repeal of a treaty); *Doe v. Braden*, 57 U.S. 635, 657-58 (1853) (whether King of Spain was authorized to enter into treaty regarding Florida territory); *see also Goldwater v. Carter*, 444 U.S. 996, 1003-04 (1979) (plurality) (authority of President to terminate a treaty).

"[p]rominent on the surface of any case held to involve a political question. . . ." *Id.* at 217. Petitioner's challenge to 18 U.S.C. § 229 implicates several of those characteristics.

a. First, with respect to the Treaty Power, there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id.* The "conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative – 'the political' – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). *See also Medellin v. Texas*, 552 U.S. 491, 511 (2008). The President "'manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success.'" *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (quoting 8 U.S. Sen. Reports, Committee on Foreign Relations (Feb. 15, 1816)).

b. Second, there are not "judicially discoverable and manageable standards," *Baker*, 369 U.S. at 217, for determining the scope of the Treaty Power, which "extends to all proper subjects of negotiation between our government and the governments of other nations." *De Geofroy v. Riggs*, 133 U.S. 258, 266 (1890). The sensitive negotiations with the other 187 nations that are party to the Chemical Weapons Convention spanned several Presidential administrations and

culminated in an extensive compact aimed at "the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons, and their destruction," by means of disarmament, free trade of chemicals, and, "for the sake of all mankind, [excluding] completely the possibility of the use of chemical weapons. . . ." Chemical Weapons Convention Preamble, Pet. App. 37-38. Such matters clearly involve "decisions of a kind for which the Judiciary has neither the aptitude, facilities nor responsibility. . . ." *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). In fact, the Senate ratification process included secret sessions and review of classified information,[14] underscoring the practical difficulties of even attempting to develop judicial standards. *See Curtiss-Wright*, 299 U.S. at 320-21 ("'The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in

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[14] *See* S. Rep. No. 104-4, Committee Activities of the Select Comm. on Intelligence, at 9-15 (Jan. 18, 1995), *available at* http://intelligence.senate.gov/pdfs/1044.pdf; Mildred Amer, *Secret Sessions of Congress. A Brief Historical Overview*, p. 6 (Congressional Research Service May 30, 2007), *available at* http://www.rules.house.gov/archives/RS20145.pdf.

relation to other powers.'") (quoting President George Washington, 1 Messages and Papers of the Presidents, p. 194).

c. Third, it may be difficult for the courts to resolve petitioner's challenge "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Policy decisions concerning the regulation of weapons – particularly in the age of biological and chemical terrorism – are undoubtedly beyond the realm of the judiciary. *Cf. Coleman v. Miller*, 307 U.S. 433, 455 (1939) ("There are many illustrations in the field of our conduct of foreign relations, where there are 'considerations of policy, considerations of extreme magnitude, and certainly, entirely incompetent to the examination and decision of a court of justice.'") (quoting *Ware v. Hylton*, 3 U.S. 199, 260 (1796)).

d. Finally, the President and Congress determined that the interests of the nation favored entering a treaty with 187 other nations to end the use of chemical weapons on all levels, a prohibition that infringes no individual rights guaranteed in the Bill of Rights or elsewhere in the Constitution. Judicial review of those presidential and senatorial determinations could result in the Court "expressing lack of the respect due coordinate branches of government" and give rise to "the potentiality of embarrassment from multifarious pronouncements by various departments." *Baker*, 369 U.S. at 217.

B. If A Tenth Amendment Challenge To The Treaty Power Is Justiciable, Only A State Has Standing To Assert That Claim.

1. At a minimum, if a Tenth Amendment challenge to the Treaty Power is justiciable, only a State would have standing to assert such a claim. To the extent this exception exists, it is arguably implicit in *Missouri v. Holland*.

The Court in *Missouri v. Holland* considered a statute enacted pursuant to a treaty with Great Britain concerning migratory birds. The State of Missouri asserted that the statute interfered with its sovereign rights reserved by the Tenth Amendment. 252 U.S. at 431. The Court rejected that claim, concluding that the Treaty Power is vested exclusively in the federal government, which may accomplish by treaty what it might not through legislation alone. *Id.* at 432-35. Indeed, the State interceded after two of its residents were indicted under the statute implementing the treaty, and the State pursued the Tenth Amendment claim alone on appeal. *Id.*

The nature of treaties aligns with the conclusion that only a State would have standing. A treaty is a contract between two sovereign nations; individuals are not parties to a treaty. *Eyde*, 112 U.S. at 598. "No nation treats with a citizen of another nation except through his government." *Frelinghuysen v. Key*, 110 U.S. 63, 71 (1884) ("[t]he citizens of the United States having claims against Mexico were not parties to this

Convention"). *See also* The Federalist No. 75 (Alexander Hamilton) ("The power of making treaties . . . Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign.").

2. Certainly, an individual may challenge the constitutionality of a treaty and its implementing legislation if there is a violation of individual rights expressly guaranteed by the Constitution. *All* acts of Congress are subject to the *prohibitions* of the Constitution. *Comstock*, 130 S. Ct. at 1957 ("Of course, as Chief Justice Marshall stated, a federal statute, in addition to being authorized by Art. I, § 8, must also 'not [be] prohibited' by the Constitution") (quoting *M'Culloch v. Maryland*, 17 U.S. 316, 421 (1819)). This principle is fundamental and applies equally to the Treaty Power, as the Court's decision in *Reid v. Covert*, 354 U.S. 1 (1957), demonstrates.

In *Reid*, the Court never discussed standing, but it permitted the spouses of members of the U.S. armed forces to argue that executive agreements with Great Britain effectively abrogated their right to a jury trial.[15] *Reid* is consistent both with statements in

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[15] *See also Downes v. Bidwell*, 182 U.S. 244, 294, 312 (1901) (White, J., concurring) (recognizing that whether a treaty acquiring property is accompanied by a promise of statehood is a political question, but that "[t]he treaty-making power vested in our government extends to all proper subjects of negotiation

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other Treaty Power cases and with the Court's general rule that the federal government cannot exercise its delegated powers in ways that violate express constitutional prohibitions. *See Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) ("The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiation between our government and other nations.") (citing *De Geofroy*, 133 U.S. at 266, 267; *Missouri*, 252 U.S. at 416); *South Dakota v. Dole*, 483 U.S. 203, 208 (1987) (a Spending Power statute cannot validly require the States to violate an "independent [constitutional] bar").

3. Consistent with these principles, the Third Circuit below addressed the merits of petitioner's claim that 18 U.S.C. § 229 is unconstitutionally vague in violation of the Fifth Amendment's Due Process

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with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein. Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts In the nature of things, limitations of this character cannot be under any circumstances transcended, because of the complete absence of power").

Clause. But that court also correctly concluded that petitioner lacked standing to raise her nonjusticiable claim that 18 U.S.C. § 229 violates the Tenth Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 10, 2011

Appendix

1. Federal Criminal Statutes Implementing Treaties

Statute	Year	Treaty and Ratification Date	Case(s)
Suppression of the Financing of Terrorism Convention Implementation Act of 2002, 18 U.S.C. § 2331 et seq.	2002	Convention for the Suppression of the Financing of Terrorism	
Terrorist Bombings Convention Implementation Act of 2002, 18 U.S.C. § 2331 et seq.	2002	Terrorist Bombings Convention Treaty	
International Antibribery and Fair Competition Act of 1998	1998	Convention on Combating Bribery of Foreign Public Officials in International Business Transactions	
Chemical Weapons Convention Implementation Act of 1998, 18 U.S.C. § 229	1998	Chemical Weapons Convention (1997)	*U.S. v. Bond*, 581 F.3d 128 (3rd Cir. 2009)

Statute	Year	Treaty and Ratification Date	Case(s)
War Crimes Act of 1996, 18 U.S.C. § 2441	1996	Article 129 of Third Geneva Convention (1955)	
Torture Act, 18 U.S.C. § 2340A	1994	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1990)	*U.S. v. Belfast*, 611 F.3d 783 (11th Cir. 2010)
Genocide Convention Implementation Act of 1987, 18 U.S.C. §§ 1091-93	1988	International Convention on the Prevention and Punishment of the Crime of Genocide (1986)	
18 U.S.C. § 2280	1988	1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation	*U.S. v. Lei Shi*, 525 F.3d 709 (9th Cir. 2008)

Statute	Year	Treaty and Ratification Date	Case(s)
Hostage Taking Act, 18 U.S.C. § 1203	1984	International Convention Against the Taking of Hostages (1981)	*U.S. v. Lue*, 134 F.3d 79 (2d Cir. 1998); *U.S. v. Rodriguez*, 587 F.3d 573 (2d Cir. 2009)
Convention on the Physical Protection of Nuclear Material Implementation Act of 1982, 18 U.S.C. § 831	1980	1980 Convention on the Physical Protection of Nuclear Material	
The Psychotropic Substances Act of 1978, 21 U.S.C. § 801a	1978	The Convention on Psychotropic Substance	
Endangered Species Act of 1973, 16 U.S.C. § 1540(b)	1973	Migratory and Endangered Bird Treaty with Japan; Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (1973)	*U.S. v. Kepler*, 531 F.2d 796 (6th Cir. 1976)

Statute	Year	Treaty and Ratification Date	Case(s)
Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 841(a)(1)	1970	Multilateral Narcotics Drugs Convention; Single Convention on Narcotic Drugs (1967)	*United States v. Rodriguez-Camacho*, 468 F.2d 1220 (9th Cir. 1972)
Obscene Publications, 18 U.S.C. § 1461	1948	Agreement for the Suppression of the Circulation of Obscene Publications (1911)	*U.S. v. Landham*, 251 F.3d 1072 (6th Cir. 2001)
Migratory Bird Treaty Act of 1918, (as amended), 16 U.S.C. §§ 703-712	1918	Convention for the Protection of Migratory Birds; Migratory Bird Treaty (1916)	*U.S. v. Ray*, 488 F.2d 15 (10th Cir. 1973); *U.S. v. Smith*, 29 F.3d 270 (7th Cir. 1994); *U.S. v. Kornwolf*, 276 F.3d 1014 (8th Cir. 2002)
White Slave Traffic Act (Mann Act), 36 Stat. 825; codified as amended at 18 U.S.C. §§ 2421-2424	1910	Agreement for Repression of Trade in White Women (1901)	

AMICUS CURIAE BRIEF

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Supreme Court, U.S.
FILED
DEC 10 2010
OFFICE OF THE CLERK

No. 09-1227

IN THE

Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE IN SUPPORT OF PETITIONER

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(19)

QUESTION PRESENTED

Petitioner admitted that she tried to injure her husband's paramour by spreading toxic chemicals on the woman's car and mailbox. Instead of allowing local officials to handle this domestic dispute, the federal prosecutor indicted petitioner under a federal law, 18 U.S.C. § 229(a), enacted by Congress to implement the United States' obligations under a 1993 treaty addressing the proliferation of chemical and biological weapons. Facing a sentence of six years in prison, petitioner challenged the statute and her resulting conviction as exceeding the federal government's enumerated powers and impermissible under the Tenth Amendment. Declining to reach petitioner's constitutional arguments, and in acknowledged conflict with decisions from other courts of appeals, the Third Circuit held that, when the state and its officers are not party to the proceedings, a private party has no standing to challenge the federal statute under which she is convicted as in excess of Congress's enumerated powers and in violation of the Tenth Amendment.

The question presented is:

Whether a criminal defendant convicted under a federal statute has standing to challenge her conviction on grounds that, as applied to her, the statute is beyond the federal government's enumerated powers and inconsistent with the Tenth Amendment.

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UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

INTEREST OF *AMICUS CURIAE*[1]

Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF"), a nonprofit organization founded in 1981, is a pro-family group that has consistently advocated a limited federal government in adherence to the text of the U.S. Constitution. Eagle Forum ELDF has long defended the domain of state and local government against encroachment by the federal government, particularly in domestic family issues. Eagle Forum successfully filed an *amicus curiae* brief in a leading precedent germane to this action. *United States v. Morrison*, 529 U.S. 598 (2000).

[1] This brief is filed with the written consent of all parties. Pursuant to its Rule 37.6, counsel for *amicus curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Under the Constitution, "the people" are the sovereign, and implicit in sovereignty is legal standing to defend it. Sovereign powers are not dependent and subservient to assertion of those powers by someone else. Accordingly, the people are not dependent on state governments for legal standing to object to overreaching by the federal government. An individual defendant such as Mrs. Bond may directly invoke the Tenth Amendment regardless of whether her State agrees. She has standing to object to any application of a federal statute that is beyond the authority of the federal government.

Once the legal standing of the people to invoke the Tenth Amendment is recognized, the outcome in this case is clear: a federal statute was applied unconstitutionally here. Specifically, a federal statute was applied here beyond the limits of the Commerce Clause, as clarified by this Court in *United States v. Morrison*. The crime at issue here – a wife attempting to injure a rival for her husband's affection – has no reasonable connection with interstate commerce. The federal conviction of Mrs. Bond should be overturned, with the federal charges against her dismissed.

A treaty cannot bootstrap a traditionally state offense into a federal one. The federal statute at bar implements a treaty designed for an international purpose, and yet was applied by a federal prosecutor to an intrinsically state offense. Implementation of a treaty cannot operate as an end run around the Constitution, and enable Congress to federalize state crimes.

ARGUMENT

The Tenth Amendment of the U.S. Constitution expressly reserves to "the people" powers neither delegated to the federal government nor prohibited to the States:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST., AMEND. X. These powers of "the people" are in no way subservient to or contingent on the cooperation of the States in asserting those powers.

Mrs. Bond plainly has standing to assert the powers reserved to the people by the Tenth Amendment, in defense against a federal prosecution of her that went beyond federal authority under the Constitution. There was no federal jurisdiction for the lower courts to entertain this prosecution against her for her quintessentially local crime of attempting to harm her husband's paramour, and this Court should order the dismissal of this case below for lack of jurisdiction.

This Court should overturn the conviction of Mrs. Bond under 18 U.S.C. § 229(a)(1), which implements the treaty known as the 1993 Chemical Weapons Convention. *United States v. Bond*, 581 F.3d 128, 132 (3d Cir. 2009), *cert. granted*, 178 L. Ed. 2d 285 (2010).

I. "The People" as Sovereign Have Standing To Assert Their Powers Under the Tenth Amendment.

The standing of the people to invoke the Tenth Amendment flows from their sovereign power. "In [our] republic ... the people are sovereign." *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (citing *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976)).

This sovereignty of the people is neither novel nor controversial. Over a half-century ago, Justice Douglas, joined by Chief Justice Warren and Justice Black, also emphasized that the people are sovereign. "Under our Constitution it is We The People who are sovereign. The people have the final say." *United States v. International Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting). While both this statement and the decision of *Citizens United* arose in the context of campaign finance, their basic point is broader: the people are the true sovereign, not their state and federal governments.

A sovereign – the people – is never dependent on its servant – the government – in asserting powers. The people may directly assert their powers under the Tenth Amendment regardless of whether state or federal governments agree. Mrs. Bond has just as much right to invoke the Tenth Amendment as any governmental official does on her behalf. To hold otherwise would be to deny that the people are sovereign and that their elected officials are public servants.

In addition, it is well established that constitutional rights belonging to the people are individual rights. From the first three words of the Constitution

through many references in its Amendments, the term "the people" includes individuals. This Court has held that:

> "the people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people."

United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

When the people are recognized as a sovereign fully empowered to assert individual rights, the issue at bar is no longer a matter of the scope of standing. Decisions tending to hold against an individual right to invoke the Tenth Amendment should thus be overturned or interpreted because of the sovereignty of the people, rather than through an expansion of standing. Mrs. Bond should prevail here not because "standing barriers have been substantially lowered" in the many decades since *Tennessee Elec. Power Co. v. TVA*. *United States v. Richardson*, 418 U.S. 166, 193 (1974) (Powell, J., concurring) (citing *Tennessee Elec. Power*, 306 U.S. 118 (1939)). Rather, Mrs. Bond enjoys an individual right to invoke the Tenth Amendment because the people are sovereign and not subjected to the approval of government in objecting to a violation of the Constitution.

In its brief here, the government bifurcates Tenth Amendment arguments into those that concern "state sovereignty" and those that concern a lack of congres-

sional authority to legislate. Gov't Br. 14-15. But that approach implicitly and erroneously denies that the people are the sovereign. The Tenth Amendment in no way subjugates the people to be servants rather than the sovereign. The text of the Tenth Amendment clearly treats the people as at least equal in power to government, and rights of the people to invoke the Tenth Amendment derive from the people as sovereign, not as a subjugated class.

The rights of the people – and their ability to assert such rights – are at least as strong under the Tenth Amendment as under other Amendments. Accordingly, the people have legal standing to assert the Tenth Amendment in defense against federal overreaching. The people retain these rights regardless of whether their state governments agree or disagree at any particular moment. Powers reserved to the people under the Tenth Amendment are not conditioned on approval by state government.

II. THERE IS NO FEDERAL JURISDICTION OVER THIS CASE DUE TO THIS COURT'S RULINGS IN *UNITED STATES V. MORRISON* AND *UNITED STATES V. LOPEZ*.

This Court's rulings in *United States v. Morrison* and *United States v. Lopez* preclude federal jurisdiction in this matter. In *Morrison*, this Court made clear that crimes of domestic violence were typically not subject to federal control. This crime is squarely within the exclusive jurisdiction of state and local governments. While the instrumentalities of nearly any crime may be sold in interstate commerce, domestic crimes themselves are simply outside the reach of the Commerce Clause.

"Every federal appellate court has a special obligation 'to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)). Jurisdiction was lacking below for this prosecution; the conviction should be overturned and the charges dismissed.

A. BOTH *UNITED STATES V. MORRISON* AND *UNITED STATES V. LOPEZ* ESTABLISH A LACK OF JURISDICTION HERE.

This Court has considered and rejected analogous encroachments by Congress into traditionally exclusive state domain. In *United States v. Morrison*, this Court invalidated a federally created cause of action over domestic crimes similar to the one at bar. 529 U.S. at 607-19. In *United States v. Lopez*, this Court struck down a federal law banning gun possession within 1,000 feet of a school. 514 U.S. 549, 551 (1995). Holding that these activities were beyond the

reach of the Commerce Clause, this Court declined to allow federal courts and prosecutors to exercise authority over them. A prosecutor likewise lacks constitutional authority to proceed in federal court with respect to a wife's local retaliation against a rival for her husband's affection.

In *Morrison*, this Court emphasized that:

> The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.

529 U.S. at 617-618 (citations omitted). This Court even went further in *Morrison*, holding that "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than ***the suppression of violent crime and vindication of its victims***." *Id.* at 618 (emphasis added).

Congress could not, consistent with *Morrison*, create a private cause of action by the victim of Mrs. Bond's activities. By the same logic a federal prosecutor cannot, consistent with the Constitution, press charges and convict Mrs. Bond in federal court for her local crime.

This Court's holding in *Lopez* likewise requires reversal of the conviction of Mrs. Bond. As this Court held in rejecting an expansive view of the Commerce Clause to include gun possession with 1,000 feet of a school, this Court noted that "if we were to accept the

Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." 514 U.S. at 564.

In concurrence, Justice Kennedy found an additional reason to reject such intrusion by the federal government into the state domain:

> Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.

Lopez, 514 U.S. at 577 (Kennedy, J., concurring).

As with the constitutional defect in *Lopez*, federalizing the crime by Mrs. Bond "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term." 514 U.S. at 583 (Kennedy, J., concurring).

The prosecution below represents an end run around the precedent established by this Court in *Morrison* and *Lopez*. The facts here offer nothing more to substantiate federal jurisdiction than what was found to be insufficient in those precedents. Given that federal jurisdiction was lacking in *Morrison* and *Lopez*, it is likewise lacking here. Mrs. Bond's conviction should be reversed and the action against her dismissed.

B. Lacking Federal Jurisdiction Over This Purely Intrastate Crime, the Underlying Charges Should Be Dismissed.

It is the duty of federal appellate courts to dismiss actions that lack jurisdiction, regardless of whether the parties raise the issue:

> [I]f the record discloses that the lower court was without jurisdiction ***this court will notice the defect, although the parties make no contention concerning it***. When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

Steel Co., 523 U.S. at 95 (citations and quotations omitted).

While the question presented here concerns whether Mrs. Bond had standing to invoke the Tenth Amendment, it is abundantly clear that federal jurisdiction was not proper below, and thus this Court should direct the lower court to dismiss the federal charges entirely. Mrs. Bond was accused of attempting to poison a woman who was interfering with her marriage, a crime fully punishable under state law. This crime of domestic violence is not within the powers established by the Constitution for the federal government; this is intrastate violence and nothing more.

III. A Treaty Cannot Bootstrap Jurisdiction For Federal Courts Beyond Constitutional Limits.

A treaty cannot circumvent constitutional limitations on federal power:

> The Constitution gives [a treaty] no superiority over an act of Congress ..., which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity.

Edye v. Robertson [*Head Money Cases*], 112 U.S. 580, 599 (1884). The existence of a treaty underlying a federal statute does not somehow render it constitutional. This Court should resolve the uncertainty expressed by the court below on this issue, in favor of constitutional limits on federal power. *See United States v. Bond*, 581 F.3d at 135 (suggesting that "the ability of the treaty power to override 'state prerogatives' is uncertain"). *See also* Gov't Brief 8 (quoting Gov't C.A. Br. 18).

The argument that a treaty could be the basis for federal jurisdiction over activity traditionally within the exclusive authority of state law was attempted unsuccessfully in *Morrison*. *See* Gov't Reply Brief in *United States v. Morrison*, 1999 U.S. Briefs [LEXIS] 5, 9 n.5 (Dec. 30, 1999) (stating that treaty rights can implicate state property rights); Brief *Amici Curiae* on Behalf of International Law Scholars and Human Rights Experts in Support of Petitioners in *United States v. Morrison*, 1999 U.S. Briefs [LEXIS] 5, 3 (Nov. 12, 1999) ("It is well established that Congress

has the authority to enact legislation that is 'necessary and proper' to meet the United States' obligations under ratified treaties, and that the existence of a valid treaty gives Congress authority to legislate over the subject matter thereof."). This argument was implicitly rejected in *Morrison*, and it should be rejected here also.

Where, as here, an intrastate activity cannot be directly regulated by Congress and the President, a treaty ratified by the Senate cannot create federal jurisdiction. Over a half-century ago, this Court flatly rejected the argument that the treaty power can tread on exclusive state jurisdiction. *See Reid v. Covert*, 354 U.S. 1 (1957). *Reid* addressed the implementation of treaties with Great Britain and Japan by a statute authorizing military trials of wives who had murdered their military-officer husbands. *Id.* at 5 (citing Article 2(11) of the Uniform Code of Military Justice, 50 U.S.C. § 552(11)). *See also* 354 U.S. at 42 (Frankfurter, J., concurring) (citing international agreements). The Court ruled against the effort to bootstrap a treaty into an encroachment on state jurisdiction.

"The obvious and decisive answer ..., of course, is that ***no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution***." *Reid*, 354 U.S. at 16 (emphasis added). In *Reid* this Court explained further:

> "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those

> arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."

Id. at 17-18 (quoting *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890)).

Congress cannot appropriate state police powers under the guise of the treaty power any more than it can "appropriat[e] state police powers under the guise of regulating commerce." *Morrison*, 529 U.S. at 627 (Thomas, J., concurring). "'Rules of international law and provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions or requirements of the Constitution and cannot be given effect in violation of them.'" *Boos v. Barry*, 485 U.S. 312, 324 (1988) (quoting 1 Restatement of Foreign Relations Law of the United States 131, Comment a, p. 53 (Tent. Draft No. 6, Apr. 12, 1985)).

The treaty power cannot accomplish an end run around constitutional limits on federal authority. "It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument." *Reid*, 354 U.S. at 18.

A married woman's criminal reaction to news that her husband is having a child with her friend does not make a federal case. These participants and their actions are not "proper subjects of negotiation between our government and the governments of other

nations." *Geofroy*, 133 U.S. at 265. The treaty power offers no added authority to regulate such domestic matters within the exclusive domain of the state police power.

CONCLUSION

The decision below should be reversed with instructions for dismissal of this entire case for lack of jurisdiction.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court, U.S.
FILED
DEC 10 2010
OFFICE OF THE CLERK

No. 09-1227

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CAROL ANN BOND, *Petitioner*,
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UNITED STATES, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
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BRIEF *AMICUS CURIAE* OF GUN OWNERS FOUNDATION, GUN OWNERS OF AMERICA, INC., AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Gun Owners Foundation ("GOF") (www.gunowners.com) was incorporated in Virginia in 1983, and is exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). GOF is an educational and legal defense organization defending the Second Amendment. **Gun Owners of America, Inc.** ("GOA") (www.gunowners.org) was incorporated in California in 1976, and is exempt from federal income tax under IRC section 501(c)(4). GOA is a citizens' lobby to protect and defend the Second Amendment. **Conservative Legal Defense and Education Fund** ("CLDEF") (www.cldef.org) was incorporated in the District of Columbia in 1982, and is exempt from federal income taxation under IRC section 501(c)(3). CLDEF is dedicated to the correct construction, interpretation, and application of the law. Each of the *amici curiae* was established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research, and to inform and educate the public on important issues of national concern, such as the construction of state and federal constitutions, and of criminal and regulatory statutes, federal and state, related to the right of citizens to bear arms, and related issues.

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[1] It is hereby certified that the parties have consented to the filing of this brief (counsel for petitioner having filed a blanket consent for *amicus curiae* briefs with the court on November 23, 2010) and that no counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE

After learning that her closest friend was carrying her husband's baby, petitioner attempted to injure her husband's paramour by spreading toxic chemicals on the woman's car and mailbox. Rather than referring the matter to local officials, the United States Attorney made a "federal case" out of it — as if this domestic dispute were a major trans-national incident. Petitioner was indicted under a federal law passed by Congress (Chemical Weapons Convention Implementation Act of 1998), purportedly enacted to implement the United States' obligations under a treaty (Chemical Weapons Convention of 1993) addressing the proliferation of chemical and biological weapons (18 U.S.C. § 229(a)).

Because the statute required no nexus to any federal interest, international or otherwise, petitioner filed a motion to dismiss on the ground that the statute exceeded the federal government's enumerated powers in violation of the Tenth Amendment. After the district court denied the motion, petitioner entered a plea of guilty, reserving her right to appeal.

The Third Circuit affirmed, ruling that petitioner — even though convicted and sentenced under the statute — had no "standing to claim that [the statute] imping[ed] on state sovereignty in violation of the Tenth Amendment, absent the involvement of a state or its officers as a party or parties." Bond v. United States, 581 F.3d 128, 137 (3d Cir. 2010).

Before the Third Circuit, the United States argued that petitioner lacked standing, but "[u]pon further reflection," the government reversed its position and "concluded ... that petitioner has standing to bring her claim." Gov. Br., p. 13, n.6. The Government first filed a brief supporting the petition for certiorari (July 9, 2010), and now has filed a brief on the merits denominated a "Brief of the United States Supporting Petitioner" ("Gov. Br.") (Dec. 3, 2010) urging this Court to reverse the decision of the Third Circuit.

In order to maintain the adversarial posture necessary for resolution, on November 10, 2010, this Court appointed Stephen R. McAllister, Esquire, to brief and argue this case, as *amicus curiae* in support of the judgment below.

ISSUE PRESENTED

Whether a criminal defendant convicted under a federal statute has standing to challenge her conviction on grounds that, as applied to her, the statute is beyond the federal government's enumerated powers and inconsistent with the Tenth Amendment.

SUMMARY OF ARGUMENT

This case presents an unusual situation where the government has reconsidered its previous position and embraced the position of a criminal defendant petitioner in seeking to overturn a lower court decision. These *amici* fully agree that the decision of

the Third Circuit should be overturned, establishing the standing of the petitioner to challenge the statute under which she was convicted as unconstitutional under Article I, Section 8, as well as the Tenth Amendment, of the U.S. Constitution.

As the federal government possesses only enumerated powers, enjoying no federal police power, it is without authority to criminalize any behavior without an express grant of authority found in the text of U.S. Constitution. Failing to find Constitutional authority for a federal crime also results in a violation of the Tenth Amendment's reservation of all non-enumerated powers to the States and the people. Contrary to the understanding of the Third Circuit, the Tenth Amendment protects both state and individual rights. Contrary to its holding, there is no requirement that a state join with a criminal defendant in order to permit that individual to challenge a federal criminal statute under which he is charged.

While petitioner and the government both agree that this defendant has standing, neither challenges the position of the Third Circuit that a defendant must not only demonstrate standing under this Court's three-part test, but also meet the nebulous standard of "prudential" considerations. Under such a view, courts have discretion to turn a deaf ear to the claims of a criminal defendant charged with the violation of a crime believed to be unconstitutional. The text of Article III, Section 2, and a series of early decisions of this Court demonstrate that no such prudential discretion exists. Chief Justice Marshall explained

that federal courts have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given.

Lastly, it is important that the standing of all individual criminal defendants who meet the standard three-part test to establish standing be reaffirmed so that the judiciary can renew its role of protecting individuals against prosecution under unconstitutional laws. The text of the U.S. Constitution and the Federalist Papers demonstrate that no significant body of federal criminal law was ever envisioned by the Framers. Nevertheless, a long succession of Congresses and Presidents have chosen to federalize criminal law, creating thousands of federal crimes with little or no constitutional authorization. If criminal defendants are deprived of standing to challenge such laws in court, an important check on the political branches will be lost, and the judiciary will become complicit in punishing individuals accused of doing no more than violating unconstitutional laws, such "laws" being a nullity — that is, no law at all.

ARGUMENT

I. The Opinion Below Was Based on a Fundamental Misunderstanding of the Federal Government's Authority to Criminalize Behavior and the Purpose of the Tenth Amendment to the U.S. Constitution.

Petitioner has described this case as "one of the easiest standing cases to reach this Court in some time." Pet. Br., p. 14. Indeed, it is difficult to understand how the court of appeals could have reached the result that it did. If the words "cases" or "controversies" in Article III of the Constitution mean anything at all, they would "extend [the] judicial Power" to decide the merits of a claim raised by a person charged with violation of a criminal statute on the grounds that a statute exceeded the enumerated powers of Congress in contravention of the Tenth Amendment.

Almost 222 years into our federal experiment, it should be unnecessary to repeat that "[t]he government of the United States is one of enumerated powers; the national Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess." Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union, Fifth Edition

(1883) p. 10.[2] "When a law of Congress is assailed as void, we look in the national Constitution to see if the grant of specified powers is broad enough to embrace it...." *Id.*, p. 207. However, if a criminal defendant has no right — no standing — to challenge the law, the judicial inquiry would never be made unless a state or state official were to intervene as a party to the case. Such a precondition, an extremely remote possibility, would accelerate the already lawless expansion of federal authority by the political branches, where individuals can be prosecuted for violating a criminal statute which, properly viewed, is no law at all — a legal nullity.[3]

The appellate court's flawed decision below is the product of at least three distinct mistakes of law. First, the court below erroneously viewed the Tenth Amendment as though it protected only states against

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[2] The U.S. Constitution is not like the "constitutions of the several States, which are not grants of powers to the States, but which apportion and impose restrictions upon the powers which the States inherently possess." *Id.*, pp. 10-11.

[3] If "the people" who delegated power to the federal government in the first place cannot trust the federal courts to constrain the political branches in their criminalization of behavior, it will give even greater impetus to the effort for the people in their role as jurors to take this responsibility to themselves — to do what the courts will not do — through jury nullification, "the act of a criminal trial jury in deciding not to enforce a law where they believe it would be unjust or misguided to do so...." Clay S. Conrad, Jury Nullification: The Evolution of a Doctrine, Carolina Academic Press (1998) p. xix. *See also* Professor James Duane, Juror's Handbook, Fully Informed Jury Association, http://www.fija.org/docs/JG_Jurors_Handbook.pdf.

federal government usurpations of authority. The Tenth Amendment is not so limited: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the **States** respectively, or to the **people**." If the court below had understood that the text of the Tenth Amendment protects "the people" as well as "the States," it would seem impossible to conclude that petitioner's challenge fails on the theory that the "'requisite representation by the states or their officers is notably absent' from her suit," as the court of appeals below ruled. *See* Bond, 581 F.3d at 137.

Second, having characterized petitioner's challenge as a "Tenth Amendment claim[]"[4] (*id.*), the court below looked to Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 143-144 (1939), a civil case challenging the constitutionality of a federal agency to sell surplus electrical power, and decisions of the First, Second, Eighth, Ninth, and Tenth Circuits which it believed were in accord. Bond, 581 F.3d at 136. However, Tennessee Electric did not involve the

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[4] Although it is unclear from the opinion below whether Petitioner ever directly invoked the Tenth Amendment in District Court, she did so in briefs filed with the Court of Appeals. *See* Bond, 581 F.3d at 134. Had the court viewed petitioner's challenge exclusively in terms of the absence of federal government power under Article I, Section 8 to criminalize her behavior, the challenge would likely not have triggered the court's analysis under the Tenth Amendment. Seeing the court's curious reaction to any mention of the Tenth Amendment in her Petition for Rehearing En Banc, the Petitioner characterized her Tenth Amendment argument as only "ancillary" to her main claim. Pet. for Reh'g En Banc, p. 6. *See generally* Gov. Br., pp. 9-10.

right of a criminal defendant such as is the case here. In Oregon v. Legal Services Corp., 552 F.3d 965 (9th Cir. 2009), the state's suit against the Legal Services Corporation for infringement of its rights under the Tenth Amendment was dismissed for lack of injury, and the court's discussion of instances when an individual lacks standing was dictum only. Of the five circuit court cases denying standing, only two involved criminal law. United States v. Parker, 362 F.3d 1279 (10th Cir. 2004), involved no federal criminal law, as the federal government was enforcing state law in a federal enclave under the Assimilative Crimes Act, 18 U.S.C. section 13. Only United States v. Hacker, 565 F.3d 522 (8th Cir., 2009), was at all analogous to the instant case, and it appears that the appellant appeared *pro se*, and that the decision was based on the same misreading of Tennessee Electric embraced by the court below.

Third, before addressing the standing issue (Bond, 581 F.3d at 134-35), the court of appeals misconstrued the case before it, analogizing a federal criminal prosecution against an individual to a conflict between the federal and state governments — completely losing sight of what is at stake here — the rights of the petitioner as an individual. Instead, the court of appeals became entangled in a discussion of petitioner's challenge to her criminal conviction as if it were a "federalism" issue arising from a conflict between national and state governments – "the ability of the treaty power to override 'state prerogatives'" (*id.* at 135) as well as invoking "'the fundamental principle of national supremacy'" (*id.* at 135 n.4).

In recognition of the difference between this case and a federalism challenge raised in a case where the state is a proper party, the government now agrees with petitioner that there is no requirement that a state be required to assert the Tenth Amendment claim of a criminal defendant. Indeed, when the federal government exceeds its constitutional authority and targets the citizen of a state, the petitioner ought not be saddled with a requirement for an intervening party representing the state's interest in the federal system.

II. Prudential Considerations Cannot Be Invoked to Deny Standing to a Defendant in a Criminal Case in a Challenge to the Constitutionality of a Federal Criminal Statute.

It is an unusual situation indeed when the government and a criminal defendant petitioner take the same side in a case before this Court, and the Court is compelled to appoint counsel to represent the now-repudiated position taken by the government below. While these *amici* agree with both petitioner and the government that this petitioner has standing, these *amici* believe that the court's decision to resolve such issues raised by defendants who meet the Court's three-part test is mandatory, not subject to any prudential considerations.

The scope of Article III is often summarized as limiting the judicial power to actual "Cases" and "Controversies." *See, e.g.*, Gov. Br., p. 21. This general

rule is dictated by the text of Article III, Section 2, which reads in full:

> **The judicial power shall extend** to **all Cases**, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to **all Cases** affecting Ambassadors, other public ministers and Consuls;--to **all Cases** of admiralty and maritime Jurisdiction;--to **Controversies** to which the United States shall be a Party;--to **Controversies** between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. [U.S. Constitution, Art. III, Sec. 2 (emphasis added).]

This case invokes only the first clause, which dictates that the judicial power "**shall extend**" to "**all cases** arising under this Constitution [and] the Laws of the United States." These are words of obligation, not discretion.

The apposite constitutional text is designed to ensure that only legal "cases" and "controversies" are resolved by the federal courts. Thus, it is required that a party must demonstrate standing, in that: (i) he

suffered an "'injury in fact'" that is "concrete and particularized," and not hypothetical or speculative; (ii) the injury is "'fairly ... trace[able] to the challenged action ... and not ... the result [of] the independent action of some third party not before the court'"; and (iii) it is "'likely' ... that the injury will be 'redressed by a favorable decision.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992).

While both petitioner and the government agree that this particular criminal defendant has Article III standing under this three-part test to challenge her conviction (Pet. Br., p. 16; Gov. Br., p. 22), neither asserts that, having concluded that there is a "case" before it, the federal judiciary has an obligation to hear her case on the merits.

Instead of insisting the court meet its constitutional obligation to decide her case on the merits, petitioner contends that her claim "satisfies [both] the ordinary requirements for constitutional **and prudential** standing...." Pet. Br., p. 16. Specifically, petitioner asserts that her claim falls within the Court's "prudential 'zone of interests test.'" *Id.*, pp. 23-24 (emphasis added).

Similarly, the government asserts that "[e]ven when a litigant satisfies the Article III standing requirements, **prudential** considerations may counsel against the exercise of federal jurisdiction...." Gov. Br., p. 23. The government describes these prudential principles as being "'essentially matters of judicial self-governance,' designed to protect the federal courts from deciding abstract questions that may be more

suited to resolution by the political branches or to judicial resolution in a different case." *Id.*, p. 24. However, in this case, the government believes that "[i]n sum, petitioner is the appropriate litigant to pursue the claim" that the statute in question is unconstitutional. *Id.*, p. 25.

The court below tried to justify its decision because other courts "point to varying **prudential** considerations," including whether allowing individuals to challenge federal laws under the Tenth Amendment "might induce a 'substantial increase ... in litigation before the federal courts.'" Bond, 581 F.3d at 137 (emphasis added). On this crucial point, the assumption of the court below that no federal court is under any obligation to protect an individual charged with an unconstitutional crime goes unchallenged by the parties.

Unlike the court below, the petitioner, and the government, these *amici* fundamentally reject any such "prudential consideration" doctrine. According to the plain meaning of Article III, Section 2, federal courts have no discretion whatsoever to turn a deaf ear to any challenge, by any defendant, to the constitutionality of any statute under which that defendant is being prosecuted — all such challenges being within the scope of such matters over which the federal power "shall extend."

In Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 738 (1824), Chief Justice Marshall explained that, under the third article of the Constitution — "the judicial power shall extend to all cases in law and

equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority" -- in these terms:

> This clause enables the judicial department to **receive jurisdiction** to the full extent of the constitution, laws, and treaties of the United States, when **any question** respecting them shall assume **such a form that the judicial power is capable of acting** on it. That power is **capable of acting only when the subject is submitted to it by a party** who asserts his rights in the form prescribed by law. It then **becomes a case**, and the constitution declares that the **judicial power shall extend to all cases** arising under the constitution, laws, and treaties of the United States. [*Id.*, 22 U.S. at 818 (emphasis added).]

When the federal government decides to prosecute an individual for the violation of a criminal statute, and that individual challenges the validity of that statute as being outside the powers conferred upon Congress in Article I, Section 8, or in violation of the limitations of the Tenth Amendment, that defendant is asserting that the federal crime is *ultra vires* -- a nullity, no law at all. Assuming that the "question" is raised in "a form that the judicial power is capable of acting on," then it "becomes a case" and "the judicial power" extends to cover it. *Id.* at 819.

The government's position that a court could choose to allow an individual to be incarcerated so that a court could engage in an act of "judicial self-governance" yields to the federal courts a power that they do not have — the power to elevate some notion of "self-governance" above its responsibility to protect each and every American citizen from a Congress that has criminalized behavior over which it has no power, and a prosecutor who determines to use that illegitimate statute.

The federal courts do not have the power to disregard "questions that may be more suited to resolution by the political branches or to judicial resolution in a different case," as argued by the government. Gov. Br., p. 24. Once behavior beyond the reach of Congress has been criminalized, there has already been a failure of the political branches — they cannot be trusted to resolve a problem that they joined to create. And it matters not whether a federal court believes that "a different case" could be brought in the future which would be a better vehicle to resolve an issue – for it is the freedom of an individual that is being decided in the case before it.

As Chief Justice Marshall so persuasively stated:

> The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it

> be brought before us. **We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.** The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. [Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (emphasis added).]

Any so-called "principle of law" by which federal courts have the latitude to overlook an unconstitutional prosecution and incarceration, potentially destroying the life, family, and finances of an individual before them, while waiting for a better case to come along to set matters right, impairs the constitutional role of the federal judiciary. Since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the federal courts have interposed their judgment to protect individuals from the unconstitutional misuse of legislative or executive power lest the political branches override the will of "the people" as expressed in the written text of the Constitution. *Id.*, 5 U.S. at 176-77. The federal judiciary must not show partiality — ignoring the plight of an illegitimately-charged individual for reasons related to institutional concerns, no matter how prudential. Rather, judicial power must be exercised without even the appearance of partiality. "Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honour the

person of the mighty: but in righteousness shalt thou judge thy neighbour." Leviticus 19:15.

Finally, the apparent "prudential" concern of the court below that the adoption of a proper view of standing "might induce a substantial increase ... in litigation before the federal courts" (Bond, 581 F.3d at 137) is no reason to leave men and women incarcerated wrongly because the political branches have exceeded their Constitutional authority.[5]

This case presents an excellent opportunity for this Court to clarify what appears to be a widespread misunderstanding about the role of the judiciary in cases arising under the Constitution — that the Court is not only granted the power of judicial review, but also the concomitant duty to exercise that power within the limits placed on it by the written Constitution. Thus, this Court should issue an opinion that makes it clear that in a federal criminal case, a federal court is presented with not just an **opportunity to decide** whether a federal crime is a legitimate exercise of constitutional authority or an unconstitutional nullity — but the **responsibility to decide** such issues once raised.

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[5] The substantial increase in federal criminal cases is not to be attributed to defendants imposing on the system by wanting their day in court, but to the proliferation of new crimes created by the political branches which are not grounded in any enumerated power, as discussed in Section III, *infra*.

III. Granting Petitioner Standing in this Case Is Necessary to Preserve the Constitutional Role of this Court to Check the Federalization of Criminal Law.

Petitioner's brief raises an important issue: that this case should be viewed in the context of the increasing federalization of criminal justice, and the need to preserve judicial checks on what it calls "federal overreach." Pet. Br., pp. 33-37. Unsurprisingly, the government's brief raises no such policy issue.

Petitioner's brief discusses this issue in policy terms: that this rampant increase in new federal crimes applies to behavior already criminalized under state law, and that such federalization swells federal judicial dockets, promotes sentencing disparities, and leads to abuses of prosecutorial discretion. *Id.* All of this is true. However, the problem of the federalization of crime is even more profound, as it implicates the constitutionality of broad categories of those crimes. For too long the political branches have reacted, not unsurprisingly, to every "violent" headline with the cry to pass a new law, frequently by creating a new crime, or ratcheting up the penalties for an existing one.[6]

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[6] The ABA Task Force on the Federalization of Crime reported that "many of these new federal laws are passed not because federal prosecution of these crimes is necessary but because federal crime legislation in general is thought to be politically popular. Put another way, it is not considered politically wise to vote against crime legislation, even if it is misguided,

Being tough on crime has been, and apparently continues to be, "good politics," and Congress has demonstrated again and again its desire not to allow the Constitution to get in the way.[7] And, for too long, the judiciary has avoided taking hard looks at the text of the Constitution to uncover the source of federal power to criminalize behavior.[8]

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unnecessary, and even harmful." ABA Task Force on Federalization of Criminal Law, The Federalization of Criminal Law, American Bar Association (1998), p. 2.

[7] Congressional efforts to require the identification of the Constitutional provision authorizing each bill have not moved in either chamber. *See* Enumerated Powers Act, S.1319, 111th Congress, introduced by Senator Tom Coburn (R-OK) (providing "Each Act of Congress shall contain a concise explanation of the specific constitutional authority relied upon for the enactment of each portion of that Act"). In introducing this bill, Senator Coburn explained its limitations:

> This bill says you can still cheat on the Constitution, but now you have to explain to the American people why you are cheating, and there will be a point of order against any bill that doesn't provide an explanation to the people.
>
> That is one of the ways we get our country back because the American people become informed. **I guarantee you many will become outraged when they hear some of the statements on why the Senate thinks we have the authority to do some of the things we do.** [Statement of Sen. Coburn, 155 *Cong. Rec.* S6934 (June 23, 2009) (emphasis added).]

See also "Enumerated Powers Act," H.R. 450, 111th Congress, introduced by Congressman John B. Shadegg (R-TX).

[8] In the area of federal firearms law, the lax form of review being utilized by federal courts in considering challenges to federal

By way of contrast, there was a time that Congress was deeply concerned about the constitutionality of the laws it was considering enacting. The seriousness and precision with which members of Congress once debated great Constitutional issues was brilliantly catalogued by legal historian David P. Currie in his series on the Constitution and Congress.[9]

Sadly, today, the routine practice of Congress is to abdicate its duty and oath to "support and defend the Constitution of the United States," pass the law, and

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criminal laws is detailed in the Amicus Curiae Brief of Gun Owners Foundation, Gun Owners of America, Inc., Gun Owners of California, Inc., Virginia Citizens Defense League, and Conservative Legal Defense and Education Fund in Support of Petitioner in Steven Skoien v. United States, Supreme Court, No. 10-7005 (Nov. 15, 2010), pp. 5-20, http://www.lawandfreedom.com/site/firearms/SkoienAmicusSC.pdf.

Lack of judicial concern about the limitations of the Commerce power is discussed in the Amicus Curiae Brief of Gun Owners Foundation, Gun Owners of America, Inc., and Virginia Civil Defense League in Montana Shooting Sports Association, Inc., et al, v. Holder, U.S. District Court for the District of Montana, Case No. 9:09-cv-147-DWM-JCL (Apr. 12, 2010), pp. 10-18, http://www.lawandfreedom.com/site/firearms/MontanaSSA_Amicus.pdf.

[9] *See generally* The Constitution in Congress: The Federalist Period, 1789-1801, Univ. of Chicago Press (1996); The Constitution in Congress: The Jeffersonians, 1801-1828, Univ. of Chicago Press (2001); The Constitution in Congress: Democrats and Whigs, 1829-1861, Univ. of Chicago Press (2005); The Constitution in Congress, Descent into the Malestrom, 1829-1861, Univ. of Chicago Press (2006).

claim the credit for having acted decisively, while leaving questions of the Constitution to the courts.[10]

The identification of specific constitutionally enumerated powers gives not the slightest hint that any significant federal criminal code was anticipated by the Framers. For example, Article I, Section 8, clause 5 vests in Congress the power "[t]o coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures." And the very next clause — Article I, Section 8, clause 6 — vests Congress with the power "to provide for the punishment of counterfeiting the Securities and current Coin of the United States." By explicitly vesting Congress with the power to criminalize counterfeiting, the Framers demonstrate that one should not imply that the "necessary and proper" clause (Art. I, Sec. 8, cl. 18) vested a general police power in Congress to use the criminal law as a "necessary and proper" means to carry out its enumerated powers.

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[10] Certainly the Congress is not only to blame. When President George W. Bush signed the Bipartisan Campaign Reform Act of 2002, he indicated that portions of the law which criminalized certain speech were unconstitutional, but felt no obligation to veto the bill just because of that concern. Weekly Compilation of Presidential Documents, Vol. 38 (Mar. 27, 2002). ("I also have reservations about the constitutionality of the broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election. I expect that the courts will resolve these legitimate legal questions as appropriate under the law.") http://www.gpo.gov/fdsys/pkg/WCPD-2002-04-01/pdf/WCPD-2002-04-01-Pg517.pdf.

Even Alexander Hamilton, a proponent of a strong national government, rejected any significant federal role in criminalizing behavior: "There is one transcendant advantage belonging to the province of the State governments, which alone suffices to place the matter in a clear and satisfactory light,--I mean the ordinary administration of **criminal** and civil justice." Federalist No. 17 (emphasis added). The Federalist Papers give little indication that any federal crimes were anticipated, except for establishing the crime of treason — the principal subject matter of the only two uses of the word "crime." *See* Federalist No. 43; Federalist No. 74 (Liberty Fund, Indianapolis: 2001). Likewise, the five uses of the word "criminal" in the Federalist Papers gave no indication of any meaningful federal criminal code. *See* Federalist Nos. 17, 42, 66, 74, and 83.

The insightful study of federal crimes by the American Bar Association's Task Force on the Federalization of Criminal Law (chaired by former Attorney General Edwin Meese) concluded that "it may be impossible to determine exactly how many federal crimes could be prosecuted today ... but the catalog of federal crimes grew from an initial handful to several thousand which exist today." ABA Task Force on Federalization of Criminal Law, The Federalization of Criminal Law, American Bar Association (1998) p. 2. Moreover, "[e]nactment of each new federal crime bestows new federal investigative power on federal agencies, broadening

their power to intrude into individual lives."[11] *Id.*, p. 27.

Over the past several years, with increasing frequency and intensity, the word has been getting out to the American people. A series of studies and popular books have focused renewed attention on the lawlessness of the criminal justice system, and particularly on the lack of Constitutional constraint on federal usurpation of the police power. *See generally* Paul Craig Roberts and Lawrence M. Stratton, The Tyranny of Good Intentions: How Prosecutors and Law Enforcement are Trampling the Constitution in the Name of Justice, Three Rivers Press (2008); In the Name of Justice, CATO Inst. (Timothy Lynch, ed., 2009); Harvey A. Silverglate, Three Felonies a Day: How the Feds Target the Innocent, Encounter Books (2009); Paul Rosenzweig and Brian W. Walsh, One Nation Under Arrest: How Crazy Laws, Rogue Prosecutors, and Activist Judges Threaten Your Liberty, Heritage Foundation (2010); and Go Directly

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[11] As Seventh Circuit Judge Richard A. Posner has observed: "The machinery of federal criminal investigation and prosecution, with its grand juries, wiretaps, DNA tests, bulldog prosecutors, pretrial detention, broad definition of conspiracy, heavy sentences (the threat of which can be and is used to turn criminals into informants against their accomplices), and army of FBI agents, is very powerful; there is a fear that fed enough time and money, **it can nail anybody**. There is some truth to this, since there are **literally thousands of federal criminal laws, many of them at once broad, vague, obscure,** and underenforced." R. Posner, An Affair of State, Harvard Univ. Press, p. 87 (1999) (emphasis added).

to Jail: The Criminalization of Almost Everything, CATO Inst. (Gene Healy, ed., 2004).

While the issue before the Court in the instant case will not solve the problem of the unwise, and often unconstitutional, federalization of crime, it will ensure that individual defendants will have the right to challenge federal prosecutors using tools given to them by Congress and the President which have largely abdicated their constitutional conscience to the judiciary. While "the people," newly awakened, assert themselves, and new members of Congress are being elected to replace the old order, it falls particularly to the judiciary to stand in the gap and protect the individual from prosecution under unconstitutional laws.

CONCLUSION

This case should be viewed as one of great import simply because it deals with the rights of a single individual. But it also presents the Court with the opportunity both (i) to reject decisively an artificial and dangerous constraint on judicial authority to protect individuals from abuses of federal power; and (ii) to ensure that the judiciary understands that its responsibility to protect individuals is not discretionary. "[I]t is the successful appeal, in which reasons of ... general applicability are given for reversing a conviction, that helps establish operative norms." J. Packer, The Limits of the Criminal Sanction, p. 232, Stanford University Press (1968). To re-establish proper operative norms, and for the

foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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December 10, 2010